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B

Information

CRIMINAL COURT OF THE CITY OF NEW YORK

COUNTY OF NEW YORK

Part I

State of New York)
County of New York) ss.:

Ptl. James Copeland of No. 8 pct., County of Kings, City of New York, being duly sworn, deposes and says that on June 6, 1966, at about 7 p.m., at Lafayette Ave. & St. James Place, in the County of Kings, State of New York, the defendant, Sidney Street did commit the crime of Malicious Mischief in that the defendant did wilfully and unlawfully defile, cast contempt upon and burn an American Flag, in violation of 1425-16-D of the Penal Law, under the following circumstances:

On the aforesaid date, place and time, the defendant did wilfully and unlawfully set fire to an American Flag and shout, "If they did that to Meredith, We don't need an American Flag."

Sworn to before me
June 6, 1966

James F. Copeland
J F C

Judge, Criminal Court of the
City of New York

Adjourned to 6/14 Bail $ par

at Part 11B, County of Kings

If paroled, the defendant was advised pursuant to section 1694b of the Penal Law.

Date Judge.

Adjourned to 6/21/66 Bail $ 500

for Trial

If paroled, the defendant was advised pursuant to section 1694b of the Penal Law.

JUN 14 1966

Date EDWARD O. CABOT Judge.

Adjourned to Bail $

If paroled, the defendant was advised pursuant to section 1694b of the Penal Law.

Date Judge

Retd 4 2 PM

JUN 6 CRIMINAL AID ASSIGN

JUN 6 1966

Judge

EDWARD ROSSBACH

SENTENCE

KESTON

AUG 9 1966

Date BERNARD J. O'CONNELL

Night Part Docket

Docket 5[illegible]

CRIMINAL COURT OF THE CITY OF NEW YORK

Part 11, County of

THE PEOPLE OF THE STATE OF NEW YORK vs.

1. Sidney Street 50 M
309 Lafayette [illegible] Bk

2.

3.

Defendant arraigned June 6, 196

Hon. Rossbach

Ptl Copeland 88 Officer and

The defendant on being brought befo informed of the within charge of violation

Malicious Mischief

of his right to communicate with relative by letter or telephone free of charge, of the aid of counsel at every stage of the and that if he desires counsel and is finan to obtain counsel, counsel shall be assi right to an adjournment to procure co right to a trial in a part of the Court hel of three judges, and if such trial is ordered to an examination of the charge.

Defendant pleads

Date

Tried and found

Date

/14 Bail $ pur

County of Kings

ant was advised pursuant to
nal Law.

Judge.

Bail $ 500

ant was advised pursuant to
al Law.

EDWARD D. CAL Judge.

Bail $

nt was advised pursuant to
al Law.

Judge.

AID ASSIGN

Judge

OSSBACH

TENCE

BOS

RNARD J. O'CONNELL

Night Part Docket

Docket 5995

CRIMINAL COURT
OF THE CITY OF NEW YORK

Part 11 County of

THE PEOPLE OF THE STATE OF NEW YORK

vs.

1. Sidney Street 50 M
309 Lafayette St. Bklyn
Address

2.
Address

3.
Address

Defendant arraigned June 6, 1966 19

Hon. Rossbach
Judge.

Ptl Copeland
88
Officer and Shield No.

Assignment.

The defendant on being brought before me was informed of the within charge of violation of

Malicious Mischief

of his right to communicate with relatives or friends by letter or telephone free of charge, of his right to the aid of counsel at every stage of the proceedings, and that if he desires counsel and is financially unable to obtain counsel, counsel shall be assigned, of his right to an adjournment to procure counsel, of his right to a trial in a part of the Court held by a panel of three judges, and if such trial is ordered, of his right to an examination of the charge.

Judge.

Defendant pleads GUILTY

Date 19

Judge.

Tried and found GUILTY

Date 19

Judge.

Complaint prepared by

Witnesses—name and address

Ptl James Copeland

7/26/66

8/9/66

Ft Sent

FINE PAID
FRANK MANDATO
COURT REPORTER
JUL 26 19

Date Amount $

Collected by

Fines Book Entry by

Docket Book Entry by

CASH BAIL POSTED. Dir. of Fin. Cert. #

ORDER THAT THE WITHIN CASH BAIL BE REFUNDED

Date Judge.

Refund Number Court Clerk

C

Endorsements on Information

A trial before a panel of three judges was ordered on demand by the defendant ☐ demand by the District Atty. ☐ motion of the Court ☐
(one box must be checked)

Date Judge.

Examination waived 196

Examination begun 196

Examination closed 196

ORDER OF DISMISSAL

There being no sufficient cause to believe the within named defendant

guilty of the offense within mentioned, I order said defendant to be discharged.

Date Judge.

ORDER TO ANSWER

It appearing to me by the within depositions and statements that the crime therein mentioned has been committed, and that there is sufficient cause to believe the within named defendant

guilty thereof, I order that said defendant be held to answer in Part County of

on 196 and be admitted to bail in the sum of $

and be committed to the Commissioner of Correction of the City of New York until the said defendant shall give such bail.

Date Judge.

APPENDIX

Order of New York Court of Appeals

COURT OF APPEALS

STATE OF NEW YORK, *ss.*:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 7th day of July in the year of our Lord one thousand nine hundred and sixty-seven, before the Judges of said Court.

WITNESS,

The HON. STANLEY H. FULD,
Chief Judge, Presiding.

RAYMOND J. CANNON,
Clerk.

REMITTITUR July 7, 1967.
App. T. 2. No. 145. 67

THE PEOPLE &C.,
Respondent,

—VS.—

SIDNEY STREET,
Appellant.

BE IT REMEMBERED, That on the 25th day of March in the year of our Lord one thousand nine hundred and sixty-seven, Sidney Street, the appellant in this cause, came here unto the Court of Appeals, by Blumenthal, Somers & Goldstick, his attorneys, and filed in the said Court a

Order of New York Court of Appeals

Notice of Appeal and return thereto from the judgment of the Appellate Term of the Supreme Court, Second Judicial Department. And The People &c., the respondent in said cause, afterwards appeared in said Court of Appeals by Aaron E. Koota, District Attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. David T. Goldstick, of counsel for the appellant, and by Mr. Harry Brodb .r, of counsel for the respondent, brief filed by amicus curiae, and after due deliberation had thereon, did order and adjudge that the judgment herein be and the same hereby is affirmed.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the Criminal Court of the City of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said judgment be affirmed, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Criminal Court of the City of New York, before the Judges thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Criminal Court, before the Judges thereof, &c.

RAYMOND J. CANNON
Clerk of the Court of Appeals
of the State of New York.

Court of Appeals, Clerk's Office,
Albany, July 7, 1967.

Decision of New York Court of Appeals

20 N. Y. 2d 231

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

—v.—

SIDNEY STREET,

Appellant.

Court of Appeals of New York

July 7, 1967

Defendant was convicted in the Criminal Court of the City of New York, Kings County, Ludwig C. Glowa, J., at time of trial, Bernard J. O'Connell, J., at time of sentence, of public desecration of the American flag. The defendant appealed. The Appellate Term of the Supreme Court in the Second Judicial Department affirmed. Appeal was allowed by permission of an associate judge of the Court of Appeals. The Court of Appeals, Fuld, C. J., held that the defendant's public burning of American flag as a protest against the shooting by a sniper of a civil rights leader while participating in a civil rights march in Mississippi was an act of incitement which was as fraught with danger to public peace as if he had stood on the street corner shouting epithets at passing pedestrians, and the state could legitimately curb such activities in interest of preventing violence and maintaining public order, nothwith-

standing that no violence actually did occur as result of flag burning.

Affirmed.

David T. Goldstick and John Somers, New York City, for appellant.

Aaron E. Koota, Dist. Atty. (Harry Brodbar, Brooklyn, of counsel), for respondent.

Peter M. Brown and Terence F. Gilheany, New York City, for United States Flag Foundation, Inc., amicus curiae.

FULD, Chief Judge.

We are called upon to decide whether the deliberate act of burning an American flag in public as a "protest" may be punished as a crime.

On June 6, 1966, after hearing on the radio that James Meredith, the civil rights leader, had been shot by a sniper in Mississippi while participating in a civil rights "march", the defendant—a decorated World War II veteran—decided to express his indignation and publicly to protest the tragic happening by burning an American flag. Owning two—one with 50 stars, the other with 48—he selected the latter and burned it on a street corner, telling the small crowd which collected that "[i]f they let that happen to Meredith we don't need an American flag." The defendant was arrested, tried and convicted for violating the provision of the Penal Law, Consol. Laws, c. 40 (§1425, subd. 16, par. d) which makes it a misdemeanor to "publicly mutilate" the United States flag.[1] He was acquitted of a sec-

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[1] Although paragraph d of subdivision 16 does not mention the word "flag", no one could possibly be misled as to the object of

ond charge of disorderly conduct and given a suspended sentence.

There is no doubt that "nonverbal expression" may be "a form of speech" within the meaning and protection of the First and Fourteenth Amendments. (People v. Stover, 12 N. Y. 2d 462, 469, 240 N. Y. S. 2d 734, 739, 191 N. E. 2d 272, 276, app. dsmd. 375 U. S. 42, 84 S. Ct. 147, 11 L. Ed. 2d 107; see Brown v. State of Louisiana, 383 U. S. 131, 142, 86 S. Ct. 719, 15 L. Ed. 2d 637 [sit-in]; Carlson v. People of State of California, 310 U. S. 106, 112, 60 S. Ct. 747, 84 L. Ed. 1104 [picketing]; Stromberg v. California, 283 U. S. 359, 51 S. Ct. 532, 75 L. Ed. 1117 [display of red flag]; cf. West Virginia State Board of Education v. Barnette, 319 U. S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628 [flag salute].) However, this does not mean that "the same kind of freedom [is afforded] to those who would communicate ideas by conduct • • • as these amendments afford to those who communicate ideas by pure speech." (Cox v. State of Louisiana, 379 U. S. 536, 555, 85 S. Ct. 453, 464, 13 L. Ed. 2d 471.) The State may, under its police powers, proscribe many forms of conduct which threaten the peace, security or well-being of its inhabitants, and the Constitution does not require that an exception be made for prohibited activities to which some persons would ascribe symbolic significance. (See People v. Stover, 12 N. Y. 2d 462, 240 N. Y. S. 2d 734, 191 N. E. 2d 272, app. dsmd. 375 U. S. 42, 84 S. Ct. 147, 11 L. Ed. 2d 107, supra; People v. Martin, 15 N. Y. 2d 933, 259 N. Y. S. 2d 152, 207 N. E. 2d 197, cert. den. 382 U. S. 828, 86 S. Ct. 64, 15

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its coverage since it is perfectly evident, from a reading of the subdivision in its entirety, that the provision was meant to apply to public mutilation of the American flag. (Compare L. 1921, ch. 428 with L. 1922, ch. 270.)

L. Ed. 2d 72; People v. Penn, 16 N. Y. 2d 581, 260 N. Y. S. 2d 847, 208 N. E. 2d 789, cert. den. 383 U. S. 969, 86 S. Ct. 1275.) Thus, rejecting arguments by defendants that their protest demonstrations were protected by the First Amendment, the courts have, in recent years, upheld convictions for (1) violation of a zoning ordinance (see People v. Stover, 12 N. Y. 2d 462, 240 N. Y. S. 2d 734, 191 N. E. 2d 272, app. dsmd. 375 U. S. 42, 84 S. Ct. 147, 11 L. Ed. 2d 107, supra); (2) disorderly conduct (see, e.g., People v. Martin, 15 N. Y. 2d 933, 259 N. Y. S. 2d 152, 207 N. E. 2d 197, cert. den. 382 U. S. 828, 86 S. Ct. 64, 15 L. Ed. 2d 72, supra; People v. Penn, 16 N. Y. 2d 581, 260 N. Y. S. 2d 847, 208 N. E. 2d 789, cert. den. 383 U. S. 969, 86 S. Ct. 1275, 16 L. Ed. 2d 309, supra); (3) trespass (see Adderley v. Florida, 385 U. S. 39, 87 S. Ct. 242, 17 L. Ed. 2d 149); (4) failure to retain possession of a draft card (see O'Brien v. United States, 376 F. 2d 538 [1st Cir.]; cf. United States v. Miller, 2 Cir., 367 F. 2d 72, cert. den. 386 U. S. 911, 87 S. Ct. 855, 17 L. Ed. 2d 787); and (5) deliberate disregard of an order closing a river to navigation. (See United States v. Aarons, 2 Cir., 310 F. 2d 341.) As the Supreme Court observed in the *Adderley* case (385 U. S. 39, 48, 87 S. Ct. 242, supra), freedom of expression does not license individuals to speak "whenever and however and wherever they please" (See, also, Walker v. City of Birmingham, 387 U. S. ——, 87 S. Ct. 1824, 18 L. Ed. 2d 1210; Kovacs v. Cooper, 336 U. S. 77, 69 S. Ct. 448, 93 L. Ed. 513.)

It is the teaching of the cases that the constitutional guarantee of free speech covers the substance rather than the form of communication and that the right to employ a particular mode of expression will be vindicated only if it has been outlawed, not because of any legitimate State interest, but solely for the purpose of censoring the under-

lying idea or thought. (See, e.g., Brown v. State of Louisiana, 383 U. S. 131, 86 S. Ct. 719, 15 L. Ed. 2d 637, supra; Cox v. State of Louisiana, 379 U. S. 536, 85 S. Ct. 453, 13 L. Ed. 2d 471, supra; Carlson v. State of California, 310 U. S. 106, 60 S. Ct. 747, 84 L. Ed. 1104, supra; Thornhill v. State of Alabama, 310 U. S. 88, 101-106, 60 S. Ct. 736, 84 L. Ed. 1093; Stromberg v. People of State of California, 283 U. S. 359, 51 S. Ct. 532, 75 L. Ed. 1117, supra; O'Brien v. United States, 1 Cir., 376 F. 2d 538, supra; but cf. United States v. Miller, 2 Cir., 367 F. 2d 72, cert. den. 386 U. S. 911, 87 S. Ct. 855, 17 L. Ed. 2d 787, supra.) On the other hand, if the State can show that the prohibition of certain conduct is designed to promote the public health, safety or well-being, then, "the circumstance that such prohibition has an impact on speech or expression" does not render the legislation violative of the First Amendment (People v. Stover, 12 N. Y. 2d, at p. 469, 240 N. Y. S. 2d at p. 739, 191 N. E. 2d at p. 276) providing, of course, that other channels of communication are open and available. (Compare Kovacs v. Cooper, 336 U. S. 77, 89, 69 S. Ct. 448, 93 L. Ed. 513, supra, with Bakery & Pastry Drivers & Helpers Local 802 etc. v. Wohl, 315 U. S. 769, 775, 62 S. Ct. 816, 86 L. Ed. 1178.)[2]

For many years now, public desecration of the American flag has been a criminal offense in all of the States. (See "Desecration of the Flag", Hearings on H. R. 271 Before Subcommittee No. 4 of House Committee on Judiciary, 90th Cong., 1st Sess. [Serial No. 4], pp. 324-346.) There

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[2] The First Amendment does not invalidate a statute prohibiting certain bizarre conduct even if the need for restrictive legislation was not fully appreciated until after someone had utilized that form of conduct as a means of social or political protest. (See People v. Stover, 12 N. Y. 2d at p. 466, 240 N. Y. S. 2d at p. 736, 191 N. E. 2d at p. 274.)

is, in fact, a Uniform Flag Law (9B Uniform Laws Annotated [1966], pp. 51-54), closely resembling subdivision 16 of section 1425 of our Penal Law, which has been adopted by more than a dozen States. This sort of legislation was enacted, it has been said, as a reaction to the unseemly practice, adopted in the 1896 presidential campaign, of affixing political slogans to the flag. (See 9B Uniform Laws Annotated [1966], p. 48.) In any event, whatever motivated the Legislature to act, the statutory purpose is clear—it is to prevent a breach of the peace. (See People ex rel. McPike v. Van de Carr, 91 App. Div. 20, 26, 86 N. Y. S. 644, affd. 178 N. Y. 425, 70 N. E. 965; Halter v. State of Nebraska, 205 U. S. 34, 41, 27 S. Ct. 419, 51 L. Ed. 696; People v. Von Rosen, 13 Ill. 2d 68, 70-71.) As the Supreme Court noted in the *Halter* case (205 U. S. 34, 41, 27 S. Ct. 419, 421, supra), "insults to a flag have been the cause of war, and indignities put upon it, in the presence of those who revere it, have often been resented and sometimes punished on the spot." Subdivision 16 of section 1425 is designed to prevent the outbreak of such violence by discouraging contemptuous and insulting treatment of the flag in public. Happily, the courts have not been called upon to apply the statute, or others like it, with any degree of frequency. In People v. Picking, 288 N. Y. 644, 42 N. E. 2d 741, we sustained a conviction under subdivision 16 for exploitation of the American flag in commercial advertising (see, also, Halter v. State of Nebraska, 205 U. S. 34, 27 S. Ct. 419, 51 L. Ed. 696, supra) and other jurisdictions have, on occasion, similarly punished such disrespectful conduct as publicly tearing a flag or throwing it to the ground. (See Hinton v. State, 223 Ga. 174, 154 S. E. 2d 246; State v. Schlueter, 127 N. J. L. 496, 23 A. 2d 249.)

We need not at this time concern ourselves with a display of the flag in a manner which does not clearly manifest an intention to desecrate it. (Compare State v. Kent, Hawaii 1st Cir. Ct., No. 36423, decided Dec. 9, 1966, with People v. Radich, 53 Misc. 2d 717, 279 N. Y. S. 2d 680, and United States Flag Foundation v. Radich, 53 Misc. 2d 597, 279 N. Y. S. 2d 233.)[3] In the case before us, the defendant concededly burned the flag in public, not for the purpose of destroying it "in a dignified way" (U. S. Code, tit. 36, §176, subd. [j]) but rather to express his indignation and sense of outrage.[4] It was an act of incitement, literally and figuratively "incendiary" and as fraught with danger to the public peace as if he had stood on the street corner shouting epithets at passing pedestrians. (See Chaplinsky v. State of New Hampshire, 315 U. S. 568, 62 S. Ct. 766, 86 L. Ed. 1031.) The State may legitimately curb such activities in the interest of preventing violence and maintaining public order. (See People v. Penn, 16 N. Y. 2d 581, 260 N. Y. S. 2d 847, 208 N. E. 2d 789, cert. den. 383 U. S. 969, 86 S. Ct. 1275, 16 L. Ed. 2d 369, supra; Chaplinsky v. State of New Hampshire, 315 N. Y. 568, 62 S. Ct. 766, 86 L. Ed. 1031, supra; Milk Wagon Drivers Union v. Meadowmoor Co., 312 U. S. 287, 294, 61 S. Ct. 552, 85 L. Ed. 836; Carlson v. People of State of California, 310 U. S. 106, 113, 60 S. Ct. 747, 84 L. Ed. 1104, supra; Halter v. State of

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[3] The statute, by its terms, does not apply to any use of the flag "expressly permitted" under Federal law or to any representation of the flag, apart from advertising, upon documents, pictures, jewelry, stationery, newspapers or magazines.

[4] On oral argument before our court, the defendant disclaimed any reliance on the fact that the flag in question was obsolete, containing but 48 stars. Indeed, we note that the statute defines an American flag as one "upon which shall be shown * * * the stars, and the stripes, in any number of either thereof".

Nebraska, 205 U. S. 34, 27 S. Ct. 419, 51 L. Ed. 696, supra; cf. Brown v. State of Louisiana, 383 U. S. 131, 139, 86 S. Ct. 719, 15 L. Ed. 2d 637, supra; Garner v. State of Louisiana, 368 U. S. 157, 173-174, 82 S. Ct. 248, 7 L. Ed. 2d 207.)

The violation of the statute may not be condoned simply because the defendant's agitation resulted from the distressing news he had heard on the radio or because no violence actually did occur as a result of the flag burning. These were mitigating circumstances which were properly taken into account by the trial court when it suspended sentence for the conviction. Moreover, since the act in question was specifically prohibited by a statute (Penal Law, §1425, subd. 16) and the defendant could be punished only once for having engaged in such conduct (Penal Law, §1938), the court did not render an inconsistent verdict when it dismissed the more general charge of disorderly conduct.

The judgment of conviction should be affirmed.

Van Voorhis, Burke, Scileppi, Bergan, Keating and Breitel, JJ., concur.

Judgment affirmed.

Statement of No Opinion in Inferior Courts

David T. Goldstick hereby states that no written opinion or memorandum was handed down by the Court below in making the judgment appealed from.

Dated: New York, New York, March 10, 1967.

Testimony in Court of Appeals Record

CRIMINAL COURT OF THE CITY OF NEW YORK

Part K-2A, Brooklyn, N. Y.

Docket Nos. 5994 and 5995

Disorderly Conduct; Malicious Mischief

For Trial

THE PEOPLE OF THE STATE OF NEW YORK
on the complaint of

PTL. JAMES COPELAND

vs.

SIDNEY STREET

Brooklyn, N. Y.
July 26, 1966.

Before:

Hon. LUDWIG GLOWA, Judge, Chiminal Court.

Appearances:

PATRICK BONOMO, Esq.,
Assistant District Attorney,
For the People.

BLUMENTHAL, SOMERS & GOLDSTICK, Esqs.,
10 East 40th Street,
New York, N. Y.
BY DAVID T. GOLDSTICK, Esq.,
For the Defendant Sidney Street.

Frank Mandato
Court Reporter.

Court Officer Salvatore Savarese: Dockets 5994 and 5995, Sidney Street, charged with Disorderly Conduct, subdivision 2, and Malicious Mischief.

Mr. Bonomo: The People move to amend the Malicious Mischief charge to add the words "In violation of Section 1425 subdivision 16d."

Mr. Goldstick: No objection! I have a couple of motions, Your Honor!

Court to Mr. Bonomo: Is that violation of 1425, 16d?

Mr. Bonomo: Yes, Your Honor.

Court: Very well!

Mr. Goldstick: Before we plead to this case I would like to make a motion to dismiss the information upon the ground it does not state facts to constitute a crime on the following grounds: The defendant was engaged in a constitutionally protected activity, to wit, freedom of speech. The allegation simply says that the defendant did wilfully and unlawfully set fire to an American flag and did say: "If they did that to Meredith we don't need an American flag." Under the first amendment of the Constitution of the United States and under the New York State constitution on freedom of speech they provide for protest in many forms, whether it be by burning a flag, demonstration or picketing. This is a form of demonstration and protest.

Court: You say burning the flag is a form of demonstration?

Mr. Goldstick: Yes.

Court: Motion denied.

Mr. Goldstick: Also, there is a Federal statute which provides for burning the flag. I refer Your Honor—

Court, interposing: So does Section 1425 provide for the lawful disposition of a flag!

Mr. Goldstick, continuing: I refer Your Honor to page 6 of my brief, referring to the United States Code that a

flag, when it is in such a condition that it is no longer a fitting emblem for display, should be destroyed in a dignified way, preferably by burning.

Now, under the supremacy clause, if there is any conflict with any statute the Federal statute takes precedence; if a State law is in conflict with a Federal law the Federal law takes precedence. The Federal law provides you may burn an American flag; therefore, New York State is without power to make a complaint and convict a man for the burning of an American flag.

Court: Motions denied. The question here would be whether he burned it because it was in such poor condition that it should be burned, or if it was an illegal demonstration.

Mr. Goldstick: Under the supremacy—

Court, interposing: Next motion!

No more argument, please!

Mr. Goldstick: I plead the defendant not guilty and take exception to Your Honor's rulings.

Court: Proceed! You may sit down, counselor! Now, we have two cases! One is Disorderly Conduct and one is Malicious Mischief.

Mr. Goldstick: I see nothing in the information regarding a charge of Disorderly Conduct.

Court: We have two charges before me!

Show the complaints to counsel!

Mr. Bonomo: We have two separate complaints! (Handing papers to Mr. Goldstick)

Mr. Goldstick: I plead not guilty to the Disorderly Conduct charge, too, Your Honor.

Court: Are you ready for trial in each case?

Mr. Goldstick: Yes.

Court: Do you stipulate that the two cases will be tried together and the facts adduced in one will be applied to the

other wherever necessary, and there will be separate findings on the facts and the law and separate judgments may be rendered!

Mr. Goldstick: I so stipulate.

Court: Let us proceed!

Mr. Bonomo: I will call Patrolman James Copeland!

JAMES COPELAND, patrolman, shield No. 18915, attached to the 88th precinct, police department, City of New York, takes the stand!

Court: Raise your right hand! Do you swear the testimony you are about to give shall be the truth, so help you God!

A. I do.

Direct examination by Mr. Bonomo:

Q. On June 6, 1966, about 7:00 p.m. did you have occasion to be present at Lafayette Avenue and St. James Place, County of Kings! A. Yes.

Q. Did you have occasion to see the defendant! A. Yes.

Q. Tell the Court the circumstances. A. When I approached St. James Place and Lafayette Avenue I noticed a crowd standing on the corner. There was a fire burning. I got out of the car and walked over to the fire. I thought some kids had started a fire.

Mr. Goldstick: I move to strike that out.

Court: Strike it out! You may sit down, counselor!

Court to witness: Did you walk over to the fire!

A. Yes, and I noticed there was a flag burning.

Mr. Goldstick: I object to any testimony about a flag burning unless we have evidence of the flag.

Court: What did you see, officer?

A. I saw a crowd standing around the fire. One of the men in the crowd said—

Mr. Goldstick, interposing: I object to that.

Court: Objection sustained! What did you see, officer?

Mr. Bonomo: And what did you hear?

Witness: I looked to the northwest side of the street and I saw this man—the defendant—standing there.

Court: Just a minute, officer! Take it easy! You say you walked over to a fire and saw something.

A. Yes.

Court: What did you see?

A. A flag burning.

Court: What kind of flag?

A. An American flag.

Court: Describe the flag.

A. It was a large flag, folded.

Court: What were the colors?

A. Red and white stripes with a background of white stars.

Court: Did you recognize the flag?

A. Yes.

Court: What was it?

A. It was an American flag.

Mr. Goldstick: I object to that without an introduction of the flag.

Court: Over-ruled.

Mr. Goldstick: Exception.

Mr. Bonomo to witness: Then what happened after you looked at the flag? A. I asked the people in the crowd who burned the flag.

Q. What did you do after talking to people? A. I went over to the other side of the street—the northwest side of Lafayette Avenue. I saw the defendant standing there. He was talking out loud.

Q. What was he saying, and describe the manner in which he was saying it. A. I couldn't understand what words he was using until I approached him. He was motioning with his hands. I heard him say: "We don't need no damn flag." I walked over to the defendant and I asked him if he burned the flag. He said: "Yes; that is my flag; I burned it." He said: "If they let that happen to Meredith we don't need an American flag." I put out the fire and took the portion of the flag which was left and took the defendant into the station house; I placed him under arrest and took him to the station house.

Q. How many people were present at the time you arrived? A. About thirty people.

Mr. Goldstick: I object to the leading!

Court: Over-ruled. Sit down, counselor!

Mr. Bonomo to witness: Were there other people present when you arrived other than the defendant? A. Yes.

Q. How many? A. About thirty people.

Q. While you were there was there any change in the number of people? A. It began to increase.

Q. At the time you made the arrest of the defendant will you estimate how many people were present? A. 35 to 40 people.

Q. Will you be able to describe to this Court the manner in which the defendant was talking?

Mr. Goldstick: I object to that.

Court: Objection sustained. He already testified to that. He said he didn't understand him when he first approached the defendant.

Mr. Bonomo to witness: How close were you to the defendant when you began to understand what he said? A. 10 or 15 feet.

Mr. Bonomo: That's all!

Mr. Goldstick: Before I cross-examine I move to dismiss both charges upon the ground the People failed to make out a prima facie case.

Court: Are you going to cross-examine?

Mr. Goldstick: Yes, but I am making a motion before cross-examination!

Court: You better cross-examine!

Cross examination by Mr. Goldstick:

Q. Officer, before you arrived at the scene were you on foot or in a patrol car? A. A patrol car.

Q. Anybody with you? A. Yes; I had a partner.

Q. Is he here in court today? A. No.

Q. Was he there during the whole occasion? A. Yes.

Q. If he were here today he would substantiate what you are saying. A. Yes.

Q. But he is not here today. A. No.

Q. Where did you park your vehicle prior to approaching the defendant? A. I parked my vehicle exactly in front of the flag, on the northeast side of Lafayette and St. James.

Q. When you say exactly in front of the flag is that where the defendant was standing? A. No; the defendant was standing on the northwest corner of St. James and Lafayette.

Q. On the northwest corner is where he was standing. A. Yes.

Q. And where was the flag? A. On the northeast corner of St. James and Lafayette.

Q. The flag was on one side of the street and the defendant was on the other side of the street. A. Yes.

Q. When you arrived and you parked your car by the flag were there any people around the flag? A. Yes.

Q. How many people were around the flag? A. 25 to 30 were around the flag.

Q. Are those the same 25 or 30 people you referred to in your direct examination? A. Yes.

Q. And where the defendant was, across the street, there weren't any people. A. Yes; there were people standing on all four corners.

Q. Now you say there were persons on all four corners; you say there were persons on all four corners. A. Yes, as we approached.

Q. How many people on the northeast corner? A. About 30 persons on the northeast corner where the flag was.

Q. How many people on the northwest corner? A. 5 or 10.

Q. That is where the defendant was. A. Yes.

Q. When you got out of your car what did you do, if anything, with regard to the flag you testified was burning? A. I began to stamp it out with my foot.

Q. What did you do with the flag? A. I left the flag there. I went over to the defendant and asked him if he burned it.

Q. You went over to the defendant. A. Yes.

Q. He was across the street. A. He was on the northwest corner.

Q. Did you pick the flag up and take it with you? A. Portions of it was still burning. My partner was trying to put it out. We didn't pick the flag up until I brought the

defendant back to the car. I picked up portions of the flag and took the defendant to the station house.

Q. What time of the day was this? A. About 7:00 p.m.

Q. Is there a subway entrance there? A. On the south-east corner there is.

Q. Was that near the rush-hour at the time? A. No; the rush-hour is about 5:00 or 6:00.

Q. And what time was this? A. About 7:00.

Q. Is there a college there? A. No; there is a housing development and a church.

Q. While you were standing on the corner where you say there were 20 or 30 people gathered was there any traffic moving in the street? A. Yes; east on Lafayette Avenue.

Q. Had the crowd over-flowed into the street to obstruct traffic? A. No.

Q. On the sidewalk were people passing by the crowd? A. Persons passing by stopped to see what happened.

Q. And did they continue to move on? A. Not all.

Q. But some did. A. Possibly.

Q. The crowd was not of such a large proportion as to obstruct the entire sidewalk. A. It is a very large sidewalk there.

Q. And people were able to get by. A. Yes.

Q. Was the crowd unruly? A. No.

Q. Were there threats or shouts?

Court: He has not testified to anything like that!

Mr. Goldstick to Court: The defendant is being charged with Disorderly Conduct.

Court: Proceed, counselor!

Mr. Goldstick to witness: When you picked up the flag you testified it was folded. A. It was folded.

Q. In your experience as a police officer have you learned the proper manner of folding an American flag? A. Yes.

Q. How? A. With stars and stripes facing up.

Q. When you found the flag was it folded in that manner? A. I could not tell you because it was burned quite badly.

Q. Was the flag on a newspaper or anything? A. No.

Mr. Goldstick: No further questions.

Mr. Bonomo: People's case, in each case!

Mr. Goldstick: I renew my motions to dismiss upon the ground the People failed to prove a prima facie case.

Court: Motion denied as to each case.

Mr. Goldstick: Exception. The defendant will take the stand!

SIDNEY STREET, defendant in this action, residing at 309 Lafayette Avenue, Brooklyn, N. Y., takes the stand!

Court: Raise your right hand! Do you swear the testimony you are about to give shall be the truth, so help you God?

A. I do.

Court: What is your occupation?

A. Bus driver.

Direct examination by Mr. Goldstick:

Q. By whom are you employed? A. New York City Transit Authority.

Q. For how long? A. 20 years.

Q. Are you married? A. Yes.

Q. Is this your first appearance in a court? A. Yes.

Q. Yon were never in any court for any reason whatsoever. A. No.

Q. Before being a bus driver for 20 years were you in the armed forces? A. Yes.

Q. How long? A. Five years.

Q. In what branch of the service? A. Quartermaster Army Corp.

Q. What rank did you achieve?

Mr. Bonomo: I object to that.

Court: Yes, that is far enough!

Q. Did you receive any decorations?

Mr. Bonomo: I object to that!

Court: Did you get honorably discharged?

A. Yes.

Q. Any decorations?

Mr. Bonomo: I object to that!

Court to witness: What decorations did you get?

A. The Bronze Star.

Mr. Goldstick to witness: On the afternoon of June 6th where were you at that time? A. On Lafayette Avenue.

Q. Where is that? A. In Brooklyn.

Q. Where? A. In my apartment.

Q. Tell the Court what happened that afternoon while you were in your apartment. A. I was sitting on the chair. I heard a news flash.

Q. What did you hear? A. That James Meredith had been shot.

Q. What did you do when you heard that? A. I said: "They didn't protect him."

Q. What did you do then? A. I went to the dresser drawer and took the flag.

Q. What flag? A. The American flag.

Q. Tell us about the flag! When did you get that flag? A. It was given to my wife's mother at her step-father's funeral.

Q. Had the flag draped his coffin? A. Yes.

Q. How old is the flag? A. About 20 years old.

Q. Describe its condition! A. It was faded.

Q. Before June 6th did you have occasion to use that flag? A. Yes.

Q. On what occasion did you use the flag? A. Displayed it on national holidays.

Q. Did you own another flag? A. Yes.

Q. What kind of flag was that? A. An American flag.

Q. How many stars in the other flag? A. The first one had 48.

Q. And the second one? A. 50.

Q. When you went to the dresser for the 48 star flag what did you do with it after hearing the broadcast? A. I carried it downstairs.

Q. Then what did you do? A. I left it neatly folded.

Q. Where did you go with the flag? A. I went down St. James and Lafayette Avenue.

Q. What did you do?

Q. I laid a piece of newspaper on the ground; I held the flag in my left hand and struck a match and made a flame and I stood there and I held it as long as I could. When it began to burn my hand I dropped the flag.

Q. Then what happened? A. Then the patrol car came by.

Q. A patrol car? A. A police car.

Q. What happened? A. The policeman got out. He thought the kids had started a fire on the street.

Mr. Bonomo: I object to that.

Court: Objection sustained.

Sidney Street, Defendant—Cross

Q. Did the officer speak to you or did you speak to him? A. He spoke to me.

Q. What did he say? A. He asked me if I set fire to the flag. I said yes.

Q. Then what happened? A. I said: "If they do what they had to Meredith we don't need this flag."

Q. While you were burning this flag did anybody say anything to you other than this police officer? A. Nobody.

Q. Did anybody stop? A. I noticed no unusual crowd.

Q. Where is that corner? A. St. James and Lafayette.

Q. Were you on the curb or in the street? A. I was on the curb. The flag was laying on the curb.

Q. When the police officer came up to you were you still by the flag? A. Yes.

Q. The flag was still burning when the officer came? A. Yes.

Q. Other than saying to the police officer "if they did that to Meredith we don't need an American flag," did you speak to anybody else at the time? A. No.

Mr. Goldstick: No further questions!

Cross examination by Mr. Bonomo:

Q. How long was that flag in the drawer before this day? A. Since Memorial Day.

Q. It was at least a year. A. Yes.

Q. During that time did you buy a new flag? A. Yes.

Q. You had a new flag which you displayed on holidays? A. I displayed the new one on Memorial Day.

Q. Have you displayed this particular flag during that time? The flag that you burned, did you display it after buying the new flag? A. No.

Q. You left it in the drawer. A. Yes.

Q. On the day in question it wasn't until you heard about James Meredith being shot that you decided to burn the flag. A. No.

Sidney Street, Defendant—Cross

Motion to Dismiss

Q. When did you decide to burn the flag? A. After I had purchased the new one I had the idea of burning that flag.

Q. But you didn't burn it. A. No.

Q. But you did burn it on the day James Meredith was shot. A. Yes.

Q. You burned it after you heard he was shot. A. Yes.

Q. Almost immediately after you heard he was shot. A. Not immediately.

Q. You went to the drawer and took out the flag and went outside and burned it, is that right? A. Yes.

Q. Then you burned it because of what you heard about Meredith and not because it was faded. A. I had planned to burn the flag anyway long before I heard about Meredith.

Mr. Bonomo: That's all!

Mr. Goldstick: The defendant rests.

Mr. Bonomo: The People rest.

Mr. Goldstick: I move to dismiss on all the constitutional grounds previously made, on all the grounds provided for in the Code of Criminal Procedure, and also upon the ground the People failed to prove a case beyond a reasonable doubt.

Court: On the charge of Disorderly Conduct the defendant is acquitted; on the charge of Malicious Mischief the defendant is convicted.

Mr. Goldstick: May we have next Tuesday for sentence?

Court: No, that is not enough time! August 9th for sentence; bail continued.

Minutes certified true and accurate.

Frank Mandata
Court Reporter.

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IN THE

Supreme Court of the United States

October Term, 1967

No. [redacted] 5

SIDNEY STREET,

Appellant,

—v.—

PEOPLE OF THE STATE OF NEW YORK,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

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IN THE

Supreme Court of the United States

October Term, 1967

No. .....

SIDNEY STREET,

Appellant,

—v.—

PEOPLE OF THE STATE OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

Appellant appeals from the final judgment of the Court of Appeals of the State of New York entered on July 7, 1967 affirming the judgment of the Appellate Term of the Supreme Court, of the Second Department, dated December 23, 1966, affirming the judgment of conviction rendered in the Criminal Court of the City of New York, County of Kings on August 9, 1966. Appellant submits this statement to show that the Court has jurisdiction and that substantial questions are presented.

Opinion Below

The opinion and judgment of the New York Court of Appeals was rendered on July 7, 1967 and is reported at 20 N. Y. 2d 231, 282 N. Y. S. 2d 491 (1967). The text of the opinion is set out in the Appendix, *infra,* p. 1a to 8a. No written opinion or memorandum was handed down by the Appellate Term of the Supreme Court or the Criminal Court.

Jurisdiction

This is an appeal of a conviction for violation of Section 1425, subd. 16, paragraph (d) of the Penal Code of the State of New York. The judgment of the Court of Appeals of the State of New York was entered on July 7, 1967. Notice of Appeal was filed September 1, 1967.

Jurisdiction of the Supreme Court to review the decision of the Court of Appeals by direct appeal is conferred by Title 28, United States Code, Section 1257(2). The following decisions sustain the jurisdiction of this Court to review the judgment in this case on direct appeal: *DeVeau* v. *Braisted,* 363 U. S. 144 (1960); *Schware* v. *Board of Bar Examiners,* 353 U. S. 232 (1957).

Questions Presented

1. Does §1425, subd. 16, paragraph (d), on its face or as applied, unconstitutionally abridge appellant's First Amendment right to free speech?

2. Does the statute, on its face or as applied, unconstitutionally abridge appellant's freedom of expression as

granted by the First Amendment because it is so broad in scope as to sweep within its ambit conduct both innocent and criminal?

3. Is the statute, on its face or as applied, so ambiguous, vague and indefinite as to fail to apprise the defendant of the meaning of the enactment thus making it unconstitutional as a deprivation of individual liberty without due process of law, in violation of the Fourteenth Amendment?

Statute Involved

New York State Penal Law, §1425:

"16. Any person, who

a. • • •

b. • • •

c. • • •

d. Shall publicly mutilate, deface, defile or defy, trample upon, or cast contempt upon either by words or act, [any such flag] • • •

e. • • •

f. • • •

g. • • •

Shall be deemed guilty of a misdemeanor; • • •"

"The words flag, standard, color, shield or ensign, as used in this subdivision or section, shall include any flag, standard, color, shield or ensign, or any picture or representation, or either thereof, made of any substance, or represented on any substance, and of any

size, evidently purporting to be, either of, said flag, standard, color, shield or ensign, of the United States of America, or of the state of New York, or a picture or a representation, of either thereof, upon which shall be shown the colors, the stars, and the stripes, in any number of either thereof, or by which the person seeing the same, without deliberation may believe the same to represent the flag, colors, standard, shield or ensign of the United States of America, or of the state of New York."

Statement of the Case

This appeal challenges the constitutionality of §1425, subdivision 16, paragraph (d), of the Penal Code of the State of New York. The statute, on its face prohibits an individual from using words or acts *in public* to "mutilate, deface, defile, or defy, trample upon, or cast contempt upon" the flag, standard, color, shield or ensign, or any picture or representation thereof of the United States of America or the State of New York.

The appellant, a Negro, Sidney Street, is a veteran of World War II, and recipient of the Bronz Star (R. 16).* He holds a responsible position with the New York City Transit Authority, is married and has no prior criminal record of any kind (R. 16).

Sometime between 6 and 7 p.m. on Monday, June 6, 1966, Street was sitting in his Brooklyn apartment listening to the radio when he heard a news announcement that James Meredith had been shot during his march through Mississippi (R. 16).

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* "R" references are to pages in the certified Record on Appeal.

Street went to a bureau drawer and carefully took out an old 48-star American flag that some years before had been presented to his wife after its use to drape the coffin at the burial of her step-father, a veteran who had been revered by both Street and his wife (R. 17).

Street carried the flag, which he and his wife had used on many occasions to celebrate national holidays, to the intersection of Lafayette Avenue and St. James Place, one block from his residence (R. 17).

Street first carefully laid a piece of paper on the sidewalk; then, keeping the flag properly folded and holding it in one hand, he set it on fire with a match (R. 17). He held the burning flag in his hand as long as he could, then laid it carefully on the piece of paper so that it would not touch the sidewalk (R. 17).

A police officer in a passing patrol car saw the smoke from the fire, stopped to investigate, and saw the burning flag (R. 18). After talking with various people who had gathered around the flag, the officer saw Street, and heard him say "We don't need no damn flag" (R. 11). The officer asked Street if he burned the flag, and Street replied, "Yes; that is my flag; I burned it. If they let that happen to Meredith we don't need an American flag" (R. 11).

The officer put out the fire, took the unburned portion of the flag, and arrested Street (R. 11). Street was later charged with two crimes. One of the charges against Street was for disorderly conduct. The other was a charge that he had engaged in:

> "Malicious mischief in that defendant did wilfully and unlawfully defile, east contempt upon and burn an American Flag, in violation of 1425(16)(d) of the

Penal Law under the following circumstances: On the aforesaid date, place and time, the defendant did wilfully and unlawfully set fire to an American Flag and shout, 'If they did that to Meredith, we don't need an American Flag' " (R. 3).

Street was acquitted of the charge of disorderly conduct, but convicted of violating section 1425(16)(d) of the Penal Law, and it is from this conviction that Street now appeals (R. 19).

How the Federal Question Is Presented

Prior to pleading not guilty, Appellant moved to dismiss the information on the grounds that it did not state facts sufficient to constitute a crime (R. 7). Appellant claimed that he was engaged in a constitutionally protected activity under the First Amendment of the Constitution of the United States and under the New York State Constitution, specifically, freedom of speech. The motion was denied (R. 7). Appellant then pleaded not guilty and renewed his motion at the end of People's case (R. 15) and again at the end of the entire case (R. 19). The motions were denied (R. 19). The constitutional issues relating to the first and Fourteenth Amendments were raised on appeal before the Appellate Term of the Supreme Court and the Court of Appeals of the State of New York. The Court of Appeals, in affirming the lower court judgment, specifically passed on the constitutional issues.

The Questions Are Substantial

Appellant's conviction raises fundamental questions of the extent to which the states, or the federal government,[1] may restrict free expression in order to protect symbols of sovereignty. As the New York Court of Appeals said: "We are called upon to decide whether the deliberate act of burning an American flag in public as a 'protest' may be punished as a crime." App., *infra*, p. 2a.

Each of the states and the District of Columbia has a flag desecration statute similar to New York's.[2] These statutes have largely remained unchallenged.[3] However, as the tempo of protest against a variety of traditional social values and unpopular government action increases, adoption and enforcement of laws designed to protect the symbols of government become increasingly frequent. Thus,

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[1] The Congress has under consideration a Federal Flag Desecration Act, discussed in greater detail, *infra*.

[2] Hearings before Subcommittee No. 4 of the Committee of the Judiciary, House of Representatives, 90th Cong., 1st Sess., pp. 324-346.

[3] This Court, in *Halter* v. *Nebraska*, 205 U. S. 34 (1907), considered one such statute in the context of a violation for the use of the flag on a beer bottle label, and upheld the statute against constitutional challenges based upon federal preemption, taking of property without due process, and failure to provide equal protection of the laws. No argument was made or considered that related to First Amendment rights. See also, *People ex rel. McKike* v. *Van DeCarr*, 91 App. Div. 20 (1904); *People* v. *Picking*, 23 N. Y. S. 2d 148 (Magistrate's Ct. City of New York, 1940), *aff'd per curiam* 263 App. Div. 366 (— Dept. 1942), *aff'd w.o. opinion* 288 N. Y. 644, 42 N. E. 2d 741 (1942); *Hinton* v. *State*, 223 Ga. 174, 154 S. E. 2d 246 (1967); *United States Flag Foundation* v. *Radich*, 53 Misc. 2d 597, 279 N. Y. 2d 233 (Sup. Ct. N. Y. County, 1967); *People* v. *Radich*, 53 Misc. 2d 717, 279 N. Y. S. 2d 680 (Cr. Ct. City of N. Y., 1967).

the Senate presently has before it a Federal Flag Desecration bill, passed by the House of Representatives in June of this year, which grants the federal government concurrent criminal jurisdiction over acts of desecration against the American flag. In August, 1965, the Congress prohibited the burning of draft cards, after listening to debates betraying unmistakable hostility to those who destroy symbols of authority and thereby challenge the policies of the government.[4] And on August 24, 1967, National Park Service officials sought to seal off the White House, the symbolic seat of government, from mass protest by restricting to 100 the number of pickets who could demonstrate there at one time.[5]

The New York Court of Appeals, in affirming appellant's conviction, relied heavily upon this Court's statement in *Cox* v. *Louisiana*, that the First and Fourteenth Amendments do not "afford the same kind of freedom to those who would communicate ideas by conduct *such as patrolling, marching, and picketing on streets and highways*, as these amendments afford to those who communicate ideas by pure speech," 379 U. S. 536, 555 (1965) (emphasis added). The court below omitted the words emphasized in this quotation, however, and by this omission implied that it saw all conduct as intrinsically different from "pure speech." Such a distinction fails to recognize the nature of appellant's act.

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[4] Two challenges to the law are now pending before this Court. *United States* v. *Miller*, 367 F. 2d 72 (2d Cir. 1966), cert. den., 386 U. S. 911 (1967), Motion for Rehearing filed April 29, 1967; *United States* v. *O'Brien*, 376 F. 2d 538 (1st Cir. 1967), Petition and Cross-Petition for Certiorari filed, 35 L. W. 3439, 3448 (1967). Cf. *Bond* v. *Floyd*, 385 U. S. 115 (1966).

[5] New York Times, August 25, 1967, p. 12.

1. §1425, subdivision 16, paragraph (d) of the New York State Penal Law, on its face and as applied, unconstitutionally abridges Appellant's First Amendment right to free verbal and symbolic speech.

Frequently, those who have greatest cause to protest are those who, by reason of economic and educational deprivation, do not have access to the mass media and cannot undertake the lobbying activities of better endowed groups. Public demonstrations symbolizing their grievances are often their only recourse.[6]

> "People seldom realize that a style of dress, of hair, *and of every kind of external nonconformity represents a sort of language, albeit frequently vague and unintelligible.* So far, no one has compiled a dictionary of these 'languages' nor researched their grammar and syntax. Nevertheless, they are forms of expression. . . . Languages themselves would have no significance if objects did not possess a speech of their own. World literature would be meaningless if the human spirit did not try to express itself in the most divergent possible ways." Singer, "The Extreme Jews," *Harper's Magazine* 55, 56, April 1967 (emphasis added).

Appellant's act was provoked by the immediate anger he experienced at the assault committed against James Meredith in Mississippi, and under the First Amendment he had a right to communicate that anger to his fellow citizens in a way that inflicted no injury upon them. The manner by which he chose to express his anger represented his belief that a society that fostered, and a government

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[6] Prof. Kalven has observed that the sit-in demonstration is the "poor man's printing press." Kalven, *The Negro and the First Amendment*, 133 (1965). Cf. *Martin* v. *Struthers*, 319 U. S. 141, 146 (1943): "Door to door distribution of circulars is essential to the poorly financed causes of little people."

that tolerated, the conditions which Meredith was himself protesting, betrayed his trust. For the moment, therefore, he sought to express his belief by destroying what he regarded as the official symbol of trust.

Beginning with the Montgomery bus boycott, protesting segregation of Negroes on city buses, those who would call attention to the racial inequities in our society, or those who would challenge the values and decisions of the majority,[6a] have been seeking new ways to communicate these ideas to the majority.[7]

We are told that the national flag, by its stripes, *symbolizes* the thirteen original states. Other legends relate the red to the blood of our ancestors shed in obtaining our freedom, and the white is symbolic of liberty; the field of blue with its stars, one *representing* each state—this entire matter is one of vesting an object of no intrinsic or utilitarian worth with value, as a means of unified expression. Justice Jackson recognized that "The use of an emblem or flag to symbolize some system, idea, institution or personality, is a short cut from mind to mind." *West*

[6a] Many scholars point out that our prevailing values, and laws, are not the creation of a majority, but, in the words of Lewis Mumford, are the creation of a "dominant minority." Mumford, *The Myth of the Machine: Technics and Human Development* (1967).

[7] *Brown* v. *Louisiana*, 383 U. S. 131 (1966) (sit-in at public library protesting segregated facilities); *Peterson* v. *City of Greenville*, 373 U. S. 244 (1963) (sit-in at lunch counter to protest segregation ordinance); *Edwards* v. *South Carolina*, 372 U. S. 229 (1963) (mass march on State Capitol protesting segregation); *United States* v. *Miller* and *United States* v. *O'Brien*, *supra*, n. 4 (burning of draft cards); *Kissinger* v. *New York City Transit Authority*, —— F. Supp. —— (S. D. N. Y., Sept. 12, 1967) (prohibition against placing of anti-war subway advertising invalidated); *Williams* v. *Wallace*, 240 F. Supp. 100 (M. D. Ala. 1965) (mass march from Selma to Montgomery, Alabama, protesting segregation).

Virginia State Bd. of Education v. *Barnette*, 319 U. S. 624, 632 (1943). Earlier, in *Halter* v. *Nebraska, supra*, this Court observed that "the flag is an *emblem* of National sovereignty." *Supra* at 41.

The right of government to construct such symbols is not in question. What is in question is the power of government to prevent the people from communicating, by actions relating to that symbol, a contrary message.

This conviction may be affirmed by this Court only if it is ready to decide that the First Amendment right of free expression can be exercised only by the means that those in power choose to permit. The guarantee of free expression, by a diversity unlimited as to means so long as those means do not interfere with the rights of others, is the spirit in which the authors of the Bill of Rights conceived these great protections of the minority.[7a] That these means include those which will allow speech to be most effective is of that same spirit. See, e.g., *Saia* v. *New York*, 334 U. S. 558, 561 (1948) (ban on loudspeakers invalidated because they are "indispensable instruments of *effective* public speech. . . . *It is the way people are reached*") (emphasis added).

The need for continuing exploration of the expanding application of the First Amendment is as apparent from the headlines as it is from the reported decisions of the state and federal courts. To choke off the peaceful, though

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[7a] History offers some dramatic examples of the type of activity in which appellant engaged. William Lloyd Garrison registered his protest against slavery by publicly burning a copy of the Fugitive Slave Law and the United States Constitution. Crosby, *Garrison the Nonresistant*. Martin Luther publicly burned on the steps of a Wittenberg church a papal bull excommunicating him. Ergang, *Europe from the Renaissance to Waterloo*.

non-verbal means by which our disaffected, discontented and—for many—formerly disenfranchised citizens can make their message known is both unconstitutional and unwise. It runs the risk of reaping the whirlwind. To foreclose the communication of ideas not only deprives persons of the rights guaranteed them by the First Amendment but deprives society of its most effective means for self-correction. See, generally, Emerson, "Toward a General Theory of the First Amendment," 72 *Yale L. J.* 877 (1963).

2. *The statute, on its face and as applied, unconstitutionally abridges the appellant's First Amendment right of free expression by prohibiting both innocent and criminal conduct.*

The New York Court of Appeals interpreted the statute at bar to prohibit certain "non-verbal expression," and said that

> "... if the State can show that the prohibition of certain conduct is designed to promote the public health, safety, or well being, then, 'the circumstance that such prohibition has an impact on speech or expression' does not render the legislation violative of the First Amendment ... providing, of course, that other channels of communication are open and available." App., *infra*, p. 5a.

Without accepting the Court's view that the existence of "other channels" of communication may permit a legislature to forbid certain peaceful means of exercising First Amendment rights, compare *Schneider* v. *State*, 308 U. S. 147 (1939), it must be noted that this view ignores the possibility that appellant was convicted for his spoken words, as well as for burning the flag.

Neither the information, which charged appellant with violating the statute by speaking certain words and doing certain acts (R. 3), nor the general verdict of guilty, show whether the appellant was convicted for the act of burning the flag or for the words spoken at the time. *Stromberg* v. *California,* 283 U. S. 359 (1931); *Winters* v. *New York,* 33 U. S. 507, 509; *Williams* v. *State of North Carolina,* 317 U. S. 287, 291-292.

It is a fundamental principle of constitutional law that statutes restrictive of or purporting to place limitations upon First Amendment freedoms must be narrowly drawn to meet the precise evil the legislature seeks to curb. A statute so broad as to sweep within its ambit conduct both innocent and criminal cannot stand. *Thornhill* v. *Alabama,* 310 U. S. 88 (1940); *Stromberg* v. *California, supra; Baggett* v. *Bullitt,* 377 U. S. 360 (1964). The difficulties such a statute would present to this Court if, as the bill now before the Congress does, it merely prohibited one from publicly "mutilating, defacing, defiling or trampling upon" the flag are magnified when phrased to permit the punishment of one who "defies" or "casts contempt . . . either by words or act" upon the flag. These words were the subject of a communication from Hon. Ramsey Clark, Attorney General of the United States, to the House Committee that had the pending federal bill under consideration. The Attorney General advised the Committee that:

> "Particular care should be exercised to avoid infringement of free speech. To make it a crime if one 'defies' or 'casts contempt * * * either by word or act' upon the national flag is to risk invalidation. This broad language may be too vague under standards of

constitutional law to constitute the basis of a criminal action. Such language reaches toward conduct which may be protected by first amendment guarantees, and the courts have found vagueness in this area. These issues were not involved in *Halter* v. *Nebraska,* 205 U. S. 34 (1907) which upheld the power of a State to enact legislation with respect to the flag, but are suggested by more recent decisions of the courts dealing with other conduct involving manifestations of respect or disrespect for the flag and the system of government it represents. See, e.g., *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624 (1943); *Stromberg* v. *California,* 283 U. S. 359 (1931); *Baggett* v. *Bullitt,* 377 U. S. 360 (1964).[8]

The New York statute involved here seemingly has two purposes. First, to encourage reverence and respect for the flag.[9] Second, and according to the Court of Appeals, the "clear" statutory purpose (App., *infra,* p. 6a), "to prevent a breach of the peace." *Ibid.*

There is ample ground upon which to assert that the Court of Appeals was in error in its expression of the statutory purpose. There is no legislative history to indicate this purpose. In addition, the prohibition against flag desecration is part of a malicious mischief statute.[10]

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[8] House of Representatives Rep. No. 350, to amend Chap. 33, Title 18 U. S. C.

[9] This was acknowledged by the District Attorney and counsel for the United States Flag Foundation, *amicus,* in argument before the court below, to be the primary purpose of the legislation.

[10] §1425 has been eliminated from the New York Revised Penal Law of 1965 by §500.05, effective September 1, 1967. It has been incorporated in entirety into the General Business Law, §136.

If the purpose were to encourage reverence and respect for the flag, this conviction is on most tenuous grounds, for the statute would fall as an act compelling an expression of belief in violation of the First Amendment. *Baggett* v. *Bullitt*, 377 U. S. 360 (1964); *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624 (1943); *Taylor* v. *Mississippi*, 318 U. S. 583 (1942).

If the legislative purpose is to prevent a breach of peace by those who may tend to grow violent when they see their American flag desecrated, the statute is unconstitutional. Street's burning the flag on the street corner and proclaiming that "If they did that to Meredith, we don't need the American flag" is not an "incitement to riot," as was found to exist in *Feiner* v. *New York*, 340 U. S. 315 (1940), or the creation of any other "clear and present danger" which would authorize interference with his First Amendment rights. *Schenck* v. *United States*, 249 U. S. 47, 52 (1919). Indeed, any such claim is precluded by the trial court's dismissal of the second charge of disorderly conduct against appellant. Moreover, we have long since passed the era that the threat of an angry crowd, or resentment by the listener against what is said, is a substantive reason for enactment of a statute that on its face restricts free speech. *Terminiello* v. *Chicago*, 337 U. S. 1 (1940); *Edwards* v. *South Carolina*, 372 U. S. 229 (1963); *Cox* v. *Louisiana*, 379 U. S. 536 (1965).

3. The statute is so ambiguous, vague, and uncertain on its face and as applied as to fail to apprise appellant of its meaning, in violation of the Fourteenth Amendment.

It is a well established principle that conduct proscribed must be defined specifically so that the person or persons affected remain secure and unrestrained in their rights to engage in activities not encompassed by the legislation. *United States* v. *Congress of Industrial Organizations*, 335 U. S. 106, 141-142 (1947). What words or acts are encompassed by the statute's terms "mutilate, deface, defile, *defy, or cast contempt upon*"?

One need not extend his imagination to visualize conviction for the failure to take one's hat off as the flag passes by or improper display of the flag or perhaps even refusal to own and display a flag on national holidays.[11] The Court's language in *Baggett* v. *Bullitt, supra*, at 371, is particularly pertinent:

> "We also conclude that the 1931 oath offends due process because of vagueness. It exacts a promise that the affiant will by precept and example promote respect for the flag and the constitutions of the United

[11] Three cases arising under the statute illustrate the broad range of conduct which it is construed to reach. Two cases involve the public display of some pieces of sculpture, incorporating the flag, which were intended as a protest against the government. In *People* v. *Radich*, 53 Misc. 2d 717, 279 N. Y. S. 2d 680 (Cr. Ct. City of N. Y., 1967), the sculptor was convicted under the same section of the statute in question here. In *United States Flag Foundation, Inc.* v. *Radich*, 53 Misc. 2d 597, 279 N. Y. S. 2d 233 (Sup. Ct. N. Y. County 1967), the Supreme Court refused to dismiss a complaint brought under subsection 16 of §1425 which allows for recovery of damages for violation of the statute.

In *People* v. *Place, et al.*, four actors were arrested for using a flag as a prop in a play criticizing contemporary American values. The charges were dismissed on motion of the District Attorney on May 23, 1967.

States and the State of Washington. The range of activities which are or might be deemed inconsistent with the required promise is very wide indeed. The teacher who refuses to salute the flag or advocates refusal because of religious beliefs may well be accused of breaching his promise. . . . Every criticism of the design or color scheme of the state flag or unfavorable comparison of it with that of a sister state or foreign country, could be deemed disrespect for and therefore violative of the oath."

CONCLUSION

For the reasons stated above, jurisdiction should be noted.

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APPENDIX

Opinion of the Court of Appeals

20 N. Y. 2d 231

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

—v.—

SIDNEY STREET,

Appellant.

Court of Appeals of New York

July 7, 1967

Defendant was convicted in the Criminal Court of the City of New York, Kings County, Ludwig C. Glowa, J., at time of trial, Bernard J. O'Connell, J., at time of sentence, of public desecration of the American flag. The defendant appealed. The Appellate Term of the Supreme Court in the Second Judicial Department affirmed. Appeal was allowed by permission of an associate judge of the Court of Appeals. The Court of Appeals, Fuld, C. J., held that the defendant's public burning of American flag as a protest against the shooting by a sniper of a civil rights leader while participating in a civil rights march in Mississippi was an act of incitement which was as fraught with danger to public peace as if he had stood on the street corner shouting epithets at passing pedestrians, and the state could legitimately curb such activities in interest of preventing violence and maintaining public order, nothwith-

standing that no violence actually did occur as result of flag burning.

Affirmed.

David T. Goldstick and John Somers, New York City, for appellant.

Aaron E. Koota, Dist. Atty. (Harry Brodbar, Brooklyn, of counsel), for respondent.

Peter M. Brown and Terence F. Gilheany, New York City, for United States Flag Foundation, Inc., amicus curiae.

FULD, Chief Judge.

We are called upon to decide whether the deliberate act of burning an American flag in public as a "protest" may be punished as a crime.

On June 6, 1966, after hearing on the radio that James Meredith, the civil rights leader, had been shot by a sniper in Mississippi while participating in a civil rights "march", the defendant—a decorated World War II veteran—decided to express his indignation and publicly to protest the tragic happening by burning an American flag. Owning two—one with 50 stars, the other with 48—he selected the latter and burned it on a street corner, telling the small crowd which collected that "[i]f they let that happen to Meredith we don't need an American flag." The defendant was arrested, tried and convicted for violating the provision of the Penal Law, Consol. Laws, c. 40 (§1425, subd. 16, par. d) which makes it a misdemeanor to "publicly mutilate" the United States flag.[1] He was acquitted of a sec-

[1] Although paragraph d of subdivision 16 does not mention the word "flag", no one could possibly be misled as to the object of

ond charge of disorderly conduct and given a suspended sentence.

There is no doubt that "nonverbal expression" may be "a form of speech" within the meaning and protection of the First and Fourteenth Amendments. (People v. Stover, 12 N. Y. 2d 462, 469, 240 N. Y. S. 2d 734, 739, 191 N. E. 2d 272, 276, app. dsmd. 375 U. S. 42, 84 S. Ct. 147, 11 L. Ed. 2d 107; see Brown v. State of Louisiana, 383 U. S. 131, 142, 86 S. Ct. 719, 15 L. Ed. 2d 637 [sit-in]; Carlson v. People of State of California, 310 U. S. 106, 112, 60 S. Ct. 747, 84 L. Ed. 1104 [picketing]; Stromberg v. California, 283 U. S. 359, 51 S. Ct. 532, 75 L. Ed. 1117 [display of red flag]; cf. West Virginia State Board of Education v. Barnette, 319 U. S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628 [flag salute].) However, this does not mean that "the same kind of freedom [is afforded] to those who would communicate ideas by conduct * * * as these amendments afford to those who communicate ideas by pure speech." (Cox v. State of Louisiana, 379 U. S. 536, 555, 85 S. Ct. 453, 464, 13 L. Ed. 2d 471.) The State may, under its police powers, proscribe many forms of conduct which threaten the peace, security or well-being of its inhabitants, and the Constitution does not require that an exception be made for prohibited activities to which some persons would ascribe symbolic significance. (See People v. Stover, 12 N. Y. 2d 462, 240 N. Y. S. 2d 734, 191 N. E. 2d 272, app. dsmd. 375 U. S. 42, 84 S. Ct. 147, 11 L. Ed. 2d 107, supra; People v. Martin, 15 N. Y. 2d 933, 259 N. Y. S. 2d 152, 207 N. E. 2d 197, cert. den. 382 U. S. 828, 86 S. Ct. 64, 15

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its coverage since it is perfectly evident, from a reading of the subdivision in its entirety, that the provision was meant to apply to public mutilation of the American flag. (Compare L. 1921, ch. 428 with L. 1922, ch. 270.)

L. Ed. 2d 72; People v. Penn, 16 N. Y. 2d 581, 260 N. Y. S. 2d 847, 208 N. E. 2d 789, cert. den. 383 U. S. 969, 86 S. Ct. 1275.). Thus, rejecting arguments by defendants that their protest demonstrations were protected by the First Amendment, the courts have, in recent years, upheld convictions for (1) violation of a zoning ordinance (see People v. Stover, 12 N. Y. 2d 462, 240 N. Y. S. 2d 734, 191 N. E. 2d 272, app. dsmd. 375 U. S. 42, 84 S. Ct. 147, 11 L. Ed. 2d 107, supra); (2) disorderly conduct (see, e.g., People v. Martin, 15 N. Y. 2d 933, 259 N. Y. S. 2d 152, 207 N. E. 2d 197, cert. den. 382 U. S. 828, 86 S. Ct. 64, 15 L. Ed. 2d 72, supra; People v. Penn, 16 N. Y. 2d 581, 260 N. Y. S. 2d 847, 208 N. E. 2d 789, cert. den. 383 U. S. 969, 86 S. Ct. 1275, 16 L. Ed. 2d 309, supra); (3) trespass (see Adderley v. Florida, 385 U. S. 39, 87 S. Ct. 242, 17 L. Ed. 2d 149); (4) failure to retain possession of a draft card (see O'Brien v. United States, 376 F. 2d 538 [1st Cir.]; cf. United States v. Miller, 2 Cir., 367 F. 2d 72, cert. den. 386 U. S. 911, 87 S. Ct. 855, 17 L. Ed. 2d 787); and (5) deliberate disregard of an order closing a river to navigation. (See United States v. Aarons, 2 Cir., 310 F. 2d 341.) As the Supreme Court observed in the *Adderley* case (385 U. S. 39, 48, 87 S. Ct. 242, supra), freedom of expression does not license individuals to speak "whenever and however and wherever they please" (See, also, Walker v. City of Birmingham, 387 U. S. ——, 87 S. Ct. 1824, 18 L. Ed. 2d 1210; Kovacs v. Cooper, 336 U. S. 77, 69 S. Ct. 448, 93 L. Ed. 513.)

It is the teaching of the cases that the constitutional guarantee of free speech covers the substance rather than the form of communication and that the right to employ a particular mode of expression will be vindicated only if it has been outlawed, not because of any legitimate State interest, but solely for the purpose of censoring the under-

lying idea or thought. (See, e.g., Brown v. State of Louisiana, 383 U. S. 131, 86 S. Ct. 719, 15 L. Ed. 2d 637, supra; Cox v. State of Louisiana, 379 U. S. 536, 85 S. Ct. 453, 13 L. Ed. 2d 471, supra; Carlson v. State of California, 310 U. S. 106, 60 S. Ct. 747, 84 L. Ed. 1104, supra; Thornhill v. State of Alabama, 310 U. S. 88, 101-106, 60 S. Ct. 736, 84 L. Ed. 1093; Stromberg v. People of State of California, 283 U. S. 359, 51 S. Ct. 532, 75 L. Ed. 1117, supra; O'Brien v. United States, 1 Cir., 376 F. 2d 538, supra; but cf. United States v. Miller, 2 Cir., 367 F. 2d 72, cert. den. 386 U. S. 911, 87 S. Ct. 855, 17 L. Ed. 2d 787, supra.) On the other hand, if the State can show that the prohibition of certain conduct is designed to promote the public health, safety or well-being, then, "the circumstance that such prohibition has an impact on speech or expression" does not render the legislation violative of the First Amendment (People v. Stover, 12 N. Y. 2d, at p. 469, 240 N. Y. S. 2d at p. 739, 191 N. E. 2d at p. 276) providing, of course, that other channels of communication are open and available. (Compare Kovacs v. Cooper, 336 U. S. 77, 89, 69 S. Ct. 448, 93 L. Ed. 513, supra, with Bakery & Pastry Drivers & Helpers Local 802 etc. v. Wohl, 315 U. S. 769, 775, 62 S. Ct. 816, 86 L. Ed. 1178.)[2]

For many years now, public desecration of the American flag has been a criminal offense in all of the States. (See "Desecration of the Flag", Hearings on H. R. 271 Before Subcommittee No. 4 of House Committee on Judiciary, 90th Cong., 1st Sess. [Serial No. 4], pp. 324-346.) There

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[2] The First Amendment does not invalidate a statute prohibiting certain bizarre conduct even if the need for restrictive legislation was not fully appreciated until after someone had utilized that form of conduct as a means of social or political protest. (See People v. Stover, 12 N. Y. 2d at p. 466, 240 N. Y. S. 2d at p. 736, 191 N. E. 2d at p. 274.)

is, in fact, a Uniform Flag Law (9B Uniform Laws Annotated [1966], pp. 51-54), closely resembling subdivision 16 of section 1425 of our Penal Law, which has been adopted by more than a dozen States. This sort of legislation was enacted, it has been said, as a reaction to the unseemly practice, adopted in the 1896 presidential campaign, of affixing political slogans to the flag. (See 9B Uniform Laws Annotated [1966], p. 48.) In any event, whatever motivated the Legislature to act, the statutory purpose is clear—it is to prevent a breach of the peace. (See People ex rel. McPike v. Van de Carr, 91 App. Div. 20, 26, 86 N. Y. S. 644, affd. 178 N. Y. 425, 70 N. E. 965; Halter v. State of Nebraska, 205 U. S. 34, 41, 27 S. Ct. 419, 51 L. Ed. 696; People v. Von Rosen, 13 Ill. 2d 68, 70-71.) As the Supreme Court noted in the *Halter* case (205 U. S. 34, 41, 27 S. Ct. 419, 421, supra), "insults to a flag have been the cause of war, and indignities put upon it, in the presence of those who revere it, have often been resented and sometimes punished on the spot." Subdivision 16 of section 1425 is designed to prevent the outbreak of such violence by discouraging contemptuous and insulting treatment of the flag in public. Happily, the courts have not been called upon to apply the statute, or others like it, with any degree of frequency. In People v. Picking, 288 N. Y. 644, 42 N. E. 2d 741, we sustained a conviction under subdivision 16 for exploitation of the American flag in commercial advertising (see, also, Halter v. State of Nebraska, 205 U. S. 34, 27 S. Ct. 419, 51 L. Ed. 696, supra) and other jurisdictions have, on occasion, similarly punished such disrespectful conduct as publicly tearing a flag or throwing it to the ground. (See Hinton v. State, 223 Ga. 174, 154 S. E. 2d 246; State v. Schlueter, 127 N. J. L. 496, 23 A. 2d 249.)

We need not at this time concern ourselves with a display of the flag in a manner which does not clearly manifest an intention to desecrate it. (Compare State v. Kent, Hawaii 1st Cir. Ct., No. 36423, decided Dec. 9, 1966, with People v. Radich, 53 Misc. 2d 717, 279 N. Y. S. 2d 680, and United States Flag Foundation v. Radich, 53 Misc. 2d 597, 279 N. Y. S. 2d 233.)[3] In the case before us, the defendant concededly burned the flag in public, not for the purpose of destroying it "in a dignified way" (U. S. Code, tit. 36, §176, subd. [j]) but rather to express his indignation and sense of outrage.[4] It was an act of incitement, literally and figuratively "incendiary" and as fraught with danger to the public peace as if he had stood on the street corner shouting epithets at passing pedestrians. (See Chaplinsky v. State of New Hampshire, 315 U. S. 568, 62 S. Ct. 766, 86 L. Ed. 1031.) The State may legitimately curb such activities in the interest of preventing violence and maintaining public order. (See People v. Penn, 16 N. Y. 2d 581, 260 N. Y. S. 2d 847, 208 N. E. 2d 789, cert. den. 383 U. S. 969, 86 S. Ct. 1275, 16 L. Ed. 2d 309, supra; Chaplinsky v. State of New Hampshire, 315 N. Y. 568, 62 S. Ct. 766, 86 L. Ed. 1031, supra; Milk Wagon Drivers Union v. Meadowmoor Co., 312 U. S. 287, 294, 61 S. Ct. 552, 85 L. Ed. 836; Carlson v. People of State of California, 310 U. S. 106, 113, 60 S. Ct. 747, 84 L. Ed. 1104, supra; Halter v. State of

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[3] The statute, by its terms, does not apply to any use of the flag "expressly permitted" under Federal law or to any representation of the flag, apart from advertising, upon documents, pictures, jewelry, stationery, newspapers or magazines.

[4] On oral argument before our court, the defendant disclaimed any reliance on the fact that the flag in question was obsolete, containing but 48 stars. Indeed, we note that the statute defines an American flag as one "upon which shall be shown * * * the stars, and the stripes, in any number of either thereof".

Nebraska, 205 U. S. 34, 27 S. Ct. 419, 51 L. Ed. 696, supra; cf. Brown v. State of Louisiana, 383 U. S. 131, 139, 86 S. Ct. 719, 15 L. Ed. 2d 637, supra; Garner v. State of Louisiana, 368 U. S. 157, 173-174, 82 S. Ct. 248, 7 L. Ed. 2d 207.)

The violation of the statute may not be condoned simply because the defendant's agitation resulted from the distressing news he had heard on the radio or because no violence actually did occur as a result of the flag burning. These were mitigating circumstances which were properly taken into account by the trial court when it suspended sentence for the conviction. Moreover, since the act in question was specifically prohibited by a statute (Penal Law, §1425, subd. 16) and the defendant could be punished only once for having engaged in such conduct (Penal Law, §1938), the court did not render an inconsistent verdict when it dismissed the more general charge of disorderly conduct.

The judgment of conviction should be affirmed.

Van Voorhis, Burke, Scileppi, Bergan, Keating and Breitel, JJ., concur.

Judgment affirmed.

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Supreme Court of the United States

OCTOBER TERM, 1968

No. [redacted] 5

SIDNEY STREET,

Appellant,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS OR AFFIRM

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IN THE

Supreme Court of the United States

October Term, 1967

No. 688

SIDNEY STREET,

Appellant,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Appellees.

MOTION TO DISMISS OR AFFIRM

Appellees, People of the State of New York, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, effective October 2, 1967, move to dismiss on the ground that the appeal is not within the jurisdiction of this Court, or, in the alternative, to affirm the order of the Court of Appeals of the State of New York appealed from, on the ground that the questions presented are so unsubstantial as not to need further argument.

Preliminary Statement

This is a direct appeal by the appellant from the order of the Court of Appeals of the State of New York, entered on July 7, 1967, affirming the order of the Appellate Term of the Supreme Court, Second Department, dated December 23, 1966, which affirmed the judgment of the Criminal Court of the City of New York, County of Kings, of August

9, 1966, convicting him of Malicious Mischief, Sec. 1425, subd. 16, para. d, of the Penal Law of the State of New York, said statute making it a misdemeanor to "publicly mutilate, deface, defile, or defy, . . . or cast contempt [upon], either by words or act . . . the flag of the United States of America." The sentence was suspended.

Opinion Below

The opinion of the Court of Appeals of the State of New York was handed down July 7, 1967 and is reported in 20 NY 2d 231, 282 NYS 2d 491, 229 N.E. 2d 187. See Jurisdictional Statement, Appendix, pp. 1a-8a, for text of the opinion. No written opinion or memorandum was handed down by the Appellate Term of the Supreme Court of the State of New York, Second Department, or the Criminal Court of the City of New York, County of Kings.

The Statute Involved

Section 1425 of the Penal Law of the State of New York provides in its pertinent parts as follows:*

"16. Any person, who

* * * * *

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* By L. 1965, c. 1031, Sec. 52, eff. Sept. 1, 1967, this statute has been superseded by Section 136 of the General Business Law of the State of New York in which the identical language is employed, except for a portion thereof not relevant herein. Since appellant has referred to the prior section in the Jurisdictional Statement, appellees will continue to do likewise with the understanding that the references are applicable to the more recent enactment.

d. *Shall publicly mutilate, deface, defile, or defy, trample upon, or cast contempt, either by words or act . . .*

• • • • •

f. [proscribing still another act] . . . *the flag of the United States of America . . .*

• • • • •

Shall be deemed guilty of a misdemeanor . . .

The words flag . . . as used in this subdivision or section, shall include any flag . . . upon which shall be shown the colors, the stars and the stripes, *in any number of either thereof,* or by which the person seeing the same, without deliberation, may believe the same to represent the flag . . . of the United States of America . . .

This subdivision shall not apply to any act expressly permitted by the statutes of the United States of America . . .'' (Emphasis supplied.)

Questions Presented

1. Should this Court depart from the well-recognized doctrine of 'mootness' since appellant's conviction carries with it no disabilities, and the period during which the suspended sentence imposed can be revoked under New York law (N.Y. Code Crim. Proc., Sec. 470-a) has now been concluded?

2. Is the statute (Sec. 1425, subd. 16, para. d, of the Penal Law of the State of New York, *supra*), on its face or as applied, an unwarranted abridgement of the constitutional guarantee of freedom of expression as mandated by the First Amendment to the United States Constitution?

3. Is the statute (Sec. 1425, subd. 16, para. d, of the Penal Law of the State of New York, *supra*) so ambiguous,

vague and indefinite on its face or as applied that it fails to adequately inform a person of the acts proscribed, or so overly broad, as to violate the Fourteenth Amendment to the United States Constitution?

Statement of the Case

The Trial

A.

The People's Case

At the commencement of the trial, the appellant moved to dismiss the complaint upon the ground that the First Amendment to the United States Constitution, as well as the Constitution of the State of New York (Article 1, Section 8), with regard to freedom of speech, protected his right to protest "in many forms, whether it be by burning a flag, demonstration or picketing," and that the appellant's act was a "form of demonstration and protest" (7).* The appellant's motion to dismiss the complaint was also predicated on the premise that the applicable statute was in violation of the Supremacy Clause of the United States Constitution. This argument, too, was not acceptable to the trial court, and that motion was likewise denied (8). A stipulation was entered into that the charges against the appellant, Malicious Mischief, and Disorderly Conduct, which had been set forth in two separate complaints, would be tried together, and that the facts adduced in one would be applied to the other "wherever necessary, and there will be separate findings on the facts and the law and separate judgments may be rendered" (8-9).

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*. Numbers in parentheses refer to pages in the certified Record on Appeal.

Patrolman James Copeland, a New York City Police Officer, testified substantially as follows:

On June 6, 1966, at or about 7:00 P.M., he had occasion to be present at Lafayette Avenue and St. James Place, in the County of Kings, City and State of New York, where he saw a crowd collected at the corner (9). There was a fire burning, and the officer got out of his car, and walked over toward the fire around which the crowd was standing (9-10). According to the officer, a large folded flag, which he recognized to be an American flag, was burning. After inquiring of the people in the crowd as to the identification of the person responsible for this, the officer walked over to the northwest side of Lafayette Avenue, on the other side of the street, where he saw the appellant standing and talking loudly (10-11). The appellant was motioning with his hands, and saying, "We don't need no damn flag". The officer asked him if he burned the flag, to which the appellant answered, "Yes, that is my flag; I burned it", and, "If they let that happen to Meredith* we don't need an American flag" (11). The officer then extinguished the fire, placed the appellant under arrest, and took him, and the remaining portion of the flag, to the precinct (11). According to the officer, about 30 people were present at the scene when the officer arrived, and by the time the arrest was made, about 35 to 40 people were in the group (11). He had been 10 or 15 feet from the appellant when he began to understand what the latter was talking about (12).

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* Referring to the unfortunate incident which occurred during a Civil Rights march when the noted Civil Rights Leader, James H. Meredith, was wounded by a sniper's bullet near Hernando, Mississippi, on June 6, 1966.

On cross-examination, the officer testified that at the time of the incident he had been in a patrol car with another officer, who was not then present in court. That officer had been present during the entire occasion, and the witness stated that if his partner were then in court he would substantiate the testimony (12). Prior to approaching the appellant, the officer parked his vehicle in front of the flag, on the northeast side of Lafayette Avenue and St. James Place, the appellant then standing on the northwest corner (12). There were people standing on all four corners, with about 30 persons on the northeast corner where the flag was, and 5 or 10 persons on the northwest corner where the appellant was then stationed (13). When the witness left the patrol car, he began to stamp out the burning flag. The officer left the flag on the ground and went over to the appellant across the street. Portions of the flag were picked up by the officer after the appellant was brought over to the patrol car (13-14). No crowd overflowed so as to obstruct traffic, and not all of the persons who stopped to see what was happening continued to move on (14). The wide sidewalk was not obstructed and persons were able to pass by. The crowd was not unruly, and neither were there any threats or shouts (14). According to the officer, who was acquainted with the correct manner of folding an American flag, it was folded with the stars and stripes facing up. He did not know if the flag had been folded in the proper way because "it was burned quite badly" (15). The flag had not been on a newspaper "or anything" (15).

B.

The Defense

The appellant testified in his own behalf substantially as follows:

He was employed as a bus driver by the New York City Transit Authority for 20 years, and was married. He had never appeared in a court before (15). He had served in the military service for a period of 5 years, and in the Quartermaster Corps. He was a recipient of the Bronze Star (16). On the day of the occurrence he had been in his apartment when he heard a news report that James Meredith had been shot. When he heard that he said, "They didn't protect him," and went to his dresser drawer and took out the American flag (16). The 48-star flag had been given to his wife's mother and had draped the coffin at the funeral of his wife's stepfather. The flag was faded, about 20 years old, and had been displayed by him on national holidays (17). He had a second flag with 50 stars. After hearing the broadcasted report about Meredith, he took the flag to St. James Place and Lafayette Avenue. There he placed a piece of newspaper on the ground, held the flag in his left hand, "struck a match and made a flame and I stood there and I held it as long as I could. When it began to burn my hand I dropped the flag" (17). The patrol car then came by, and the officer asked him if he had set fire to the flag (17-18). He admitted that he had, and told the officer, "If they do what they had (*sic*) to Meredith we don't need this flag" (18). No one else spoke to him, and he noticed no unusual crowd. The flag which was still burning when the officer came, was on the curb. The appellant did not speak to anyone else at the time (18).

On cross-examination, the appellant testified that the particular flag involved had been in the dresser drawer for at least one year, and that he had displayed a new flag the previous Memorial Day (18). The flag in question had not been displayed after the new one was purchased. When asked when he had decided to burn the old flag, the appellant testified that the idea of doing so had come when the new one was purchased. However, he did burn it after he heard that James Meredith had been shot, although "not immediately;" he had planned to burn the flag long before he "heard about Meredith" (19).

At the conclusion of the trial, the appellant was acquitted of the charge of Disorderly Conduct, and found guilty of Malicious Mischief in that he violated Section 1425, subd. 16, para. d, of the Penal Law, *supra,* (19), for which he received a suspended sentence (4, 24).

Summary of Arguments

This Court has long enunciated the doctrine of "mootness" wherein no attempt will be made to review an appeal on the merits without a showing of factors vital enough to move the Court from this traditional rule. It is the respectful submission of the appellees that there do not exist any considerations to veer this Court from the majority determination as recently declared as June 12, 1967 in *Jacobs* v. *New York,* 388 U.S. 431, 87 S. Ct. 2098, and, *Tannenbaum* v. *New York,* 388 U.S. 439, 87 S. Ct. 2107.

In addition, the statute in question, Sec. 1425, subd. 16, para. d, of the Penal Law of the State of New York, *supra,* designed to preserve the dignity of the flag of the United States of America, the cherished symbol of "our heritage

and our hopes,'"* is not vague or overbroad, nor is it an unreasonable restraint of free expression. There is a serious need for such legislation, especially in these critical times which appellees choose to refer to as an "era of arrogance." Proscribing the appellant's act of desecration is dictated by a legitimate State interest, and not solely by any desire to suppress underlying thought or opinion. The concern to protect the safety and well-being of a free and orderly society transcends individual liberties so that a reasonable restraint upon the exercise of free expression becomes warranted in order to assure that a greater good will be accomplished. It is the appellees' intention to emphasize the vital need for such a statute, and in so doing, to establish that the questions presented by the appellant are so unsubstantial as to preclude any further argument in this Court.

THE ARGUMENTS

I.

The Question is Moot.

It is the respectful submission of the appellees herein that since the sentence imposed upon the appellant was suspended on August 9, 1966, and the conviction carries no disabilities such as loss of civil rights, the doctrine of "mootness" can be properly applied after the period during which such suspended sentence can be revoked and replaced by a prison sentence which, in the State of New York, is one year from the date of original sentence. (See N.Y. Code Crim. Proc., Sec. 470-a.) Neither New York law nor

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* Mr. Justice Frankfurter in *West Virginia Board of Education* v. *Barnette,* 319 U.S. 624, 662, 63 S. Ct. 1178, 1196 (1943) (dissenting opinion).

federal law imposes any further penalty for conviction of the misdemeanor involved in this appeal. Consequently, we are constrained to rely on the authority of the majority holdings in *Jacobs* v. *New York*, 388 U.S. 431, 87 S. Ct. 2098 (1967), *supra*, and *Tannenbaum* v. *New York*, 388 U.S. 439, 87 S. Ct. 2107 (1967), *supra*,* wherein this Court applied the doctrine of "mootness" in situations substantially similar to the case at bar, and which also involved first amendment considerations.

Any contention that the appellant's "subsequent conduct will be significantly chilled by the conviction on his record" (See *Jacobs* v. *New York*, 388 U.S. at 433, 87 S. Ct. at 2099, *supra*, Warren, C.J., dissenting opinion) cannot be legally acceptable in the light of the appellees' claim that the conduct upon which the conviction was predicated is not constitutionally-protected, and will continue to be reprehensible in nature, thereby dissipating all claims that fundamental rights have been interfered with (ARGUMENT II, *infra*).

Although in *Jacobs*, *supra*, the appellants argued that "they should not be constitutionally convicted because their conduct demonstrates their good-faith belief that they were not exhibiting obscene material" (388 U.S. at 433, 87 S. Ct. at 2100), such a contention appears to rest on more tenable ground, because of the prevalence of conflicting notions regarding views as to what is obscene, than would any position concerning flag-desecration which appellees herein do not feel can be recognized on first impression to be within the ambit of protection afforded by the United States Constitution. Thus, it cannot be truly propounded that there will be an *in terrorem* effect if the

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* In Tannenbaum, *supra*, rehearing was denied (388 U.S. October 9, 1967).

Court does not note jurisdiction and declines to review the case on the merits.

With regard to the appellant herein, there is no pecuniary interest in the outcome of this appeal for there is nothing that can be claimed to be the subject of forfeiture. To reiterate, also, there is no loss of civil rights. (Compare *Fiswick* v. *United States,* 329 U.S. 211, 67 S. Ct. 224 [1946]; *United States* v. *Morgan,* 346 U.S. 502, 74 S. Ct. 247 [1954].)

In *St. Pierre* v. *United States,* 319 U.S. 41, 42, 63 S. Ct. 910, 911 (1943), this Court stated:

> "A federal court is without power to decide moot questions or to give advisory opinions which cannot affect the rights of litigants in the case before it [citing cases]."

It is also significant that in *St. Pierre, supra,* it was also advanced:

> "Petitioner also suggests that the judgment may impair his credibility as a witness in a future legal proceeding. But the moral stigma of a judgment which no longer affects legal rights does not present a case or controversy for appellate review." (*Id.* at 43, 63 S. Ct. at 911-12.)

Unlike the appellant in *Parker* v. *Ellis,* 362 U.S. 574, 80 S. Ct. 909 (1960), the appellant herein was represented by counsel at all stages of the proceeding.

In view of the foregoing, it is respectfully urged that contrary to the position taken by Mr. Chief Justice Warren in his dissenting opinion in *Jacobs* v. *New York,* 388 U.S. 431, 434, 87 S. Ct. 2098, 2100 (1967), *supra,* this Court would not be "straining the mootness doctrine" if the said doctrine were applied to the instant appeal.

II.

The Statute, as a proper exercise of the State's police power, does not unconstitutionally denigrate appellant's fundamental right of expression, symbolic or otherwise, and is clearly defined, being neither vague, imprecise nor overly broad.

Sec. 1425, subd. 16, para. d, of the Penal Law of the State of New York, *supra*, provides that any person who shall "publicly mutilate, deface, defile, or defy, trample upon, or cast contempt upon either by words or act" any flag of the United States of America, said flag described as one showing the "colors, the stars, and the stripes . . . or by which the person seeing the same, without deliberation may believe the same to represent the flag . . . of the United States of America," shall be guilty of a misdemeanor.

The appellees are mindful of the fact that a State may not unreasonably make any law abridging freedom or liberty of speech (First and Fourteenth Amendments to the United States Constitution). (See *Gitlow* v. *New York*, 268 U.S. 652, 666, 45 S. Ct. 625, 630 [1924]; *Whitney* v. *California*, 274 U.S. 357, 373, 47 S. Ct. 641, 647 [1927]; *Grosjean* v. *American Press Co.*, 297 U.S. 233, 243, 244, 56 S. Ct. 444, 446 [1936].) The right to "speak freely" is the foundation of democratic government, and as expounded by Mr. Justice Holmes in *United States* v. *Schwimmer*, 279 U.S. 644, 654-55, 49 S. Ct. 448, 451 (1929) (dissenting opinion), "[I]f there is any principle of the [U.S.] Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought we hate." Yet it is significant that until about 1922, the United States Su-

preme Court accepted the view that the Fourteenth Amendment did not make the First Amendment binding on the States. (See *Prudential Insurance Co.* v. *Cheek*, 259 U.S. 530, 543, 42 S. Ct. 516, 522 [1922].) In 1925, the Court in *Gitlow* v. *New York, supra,* at 666, 45 S. Ct. at 630, "ventured the tentative assumption that the 'freedom' of speech protected by the First Amendment was included in the 'liberty' which the Fourteenth Amendment required the states to respect." (See DUMBAULD, BILL OF RIGHTS AND WHAT IT MEANS TODAY 133 [1957].) Eventually, through the process of "incorporation" or "absorption," all of the First Amendment liberties were made binding against the States. In the area of free speech, the case of *West Virginia State Board of Education* v. *Barnett*, 319 U.S. 624, 633, 63 S. Ct. 1178, 1183 (1943), is particularly noteworthy as showing just when a State may not be permitted to censor or suppress expression of opinion. Thus, although a flag salute was involved, it was this Court's majority view that "[t]o sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind." (*Id.* at 634, 63 S. Ct. at 1183.)

Yet, conceding the sacrosanct nature of First Amendment freedoms, particularly the one concerned with free speech, it is respectfully submitted that a State may, in the exercise of its police power, place reasonable regulations and restrictions upon this constitutional guarantee in the interest of public order. (See *Davis* v. *Massachusetts*, 167 U.S. 43, 47, 17 S. Ct. 731, 733 [1897]; *Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418, 439, 31 S. Ct. 492, 497 [1911]; *Schenck* v. *United States*, 249 U.S. 47, 52, 39 S. Ct. 247, 249 [1919];

Gitlow v. *New York*, 268 U.S. 652, *supra*, at 667, 45 S. Ct. at 630; *Whitney* v. *California*, 274 U.S. 357, 371, 47 S. Ct. 646, 647 [1927], *supra*.)

In order to sustain the position of the appellees herein, it becomes vital to point out in some detail the philosophy underlying the need for a statute such as Sec. 1425, subd. 16, para. d, of the Penal Law of the State of New York, *supra*.

In *People ex rel. McPike* v. *Van De Carr*, 91 App. Div. 20, 26 (1st Dept. 1904), *aff'd*, 178 N.Y. 425 (1904), Mr. Justice Patterson, in emphasizing the need for the statute, stated as follows:

> "It was competent for the Legislature to make it a misdemeanor to publicly mutilate, deface, defy, defile, trample upon or cast contempt, either by word or act, upon the National or State flag, and mutilation of the flag may mean the printing of an advertisement on the ensign itself. Such legislation is within the police power of the State, for it relates to the preservation of the peace. It tends to prevent the commission of acts which would arouse the indignation of the public and lead to the infliction of summary chastisement upon an offender; for *it is not a mere rhetorical phrase to say that the people have constituted themselves the guardians and protectors of the National flag.* The State has taken upon itself the punishment of those whose acts would excite the people to violence, and legislation to accomplish that result relates directly to the preservation of the public peace and the good order of society." (Emphasis supplied.)

It is significant that Mr. Justice Patterson's language was later unanimously approved by the Court of Appeals (178 N.Y. 425, *supra*), although the court also affirmed a

finding that another portion of the statute, not pertinent herein, was constitutionally defective since it was improperly applied, also, to articles manufactured and in existence before the section was enacted, thereby destroying existing property rights.

Nor has the Supreme Court of the United States failed to voice its feeling about the "object of national piety" (*Durable Toy & Novelty Corporation* v. *J. Chein & Co.*, 133 F. 2d 853, 855 [2d Cir. 1943] [Cir. Judge Learned Hand]). In *Halter* v. *Nebraska*, 205 U.S. 34, 27 S. Ct. 419 (1906), the Court (per Mr. Justice Harlan), in passing upon the constitutionality of a statute which proscribed the use of the flag for advertising purposes, stated:

> "From the earliest periods in the history of the human race, banners, standards and ensigns have been adopted as symbols of the power and history of the peoples who bore them. It is not then, remarkable that the American people, acting through the legislative branch of the Government, early in their history, prescribed a flag as symbolical of the existence and sovereignty of the Nation. Indeed, it would have been extraordinary if the Government had started this country upon its marvelous career without giving it a flag to be recognized as the emblem of the American Republic. For that flag every true American has not simply an appreciation, but a deep affection. No American, nor any foreign-born person who enjoys the privileges of American citizenship, ever looks upon it without taking pride in the fact that he lives under this free Government. Hence, it has often occurred that insults to a flag have been the cause of war, and indignities put upon it, in the presence of those who revere it, have often been resented and sometimes punished on the spot. (*Id.* at 41, 27 S. Ct. at 421.)

> "[W]e are of opinion that those who enacted the statute knew, what is known of all, that to every true American the flag is the symbol of the Nation's power, the emblem of freedom in its truest, best sense. It is not extravagant to say that to all lovers of the country it signifies government resting on the consent of the governed; liberty regulated by law; the protection of the weak against the strong; security against the exercise of arbitrary power; and absolute safety for free institutions against foreign aggression. As the statute in question evidently had its origin in a purpose to cultivate a feeling of patriotism among the people of Nebraska, we are unwilling to adjudge that in legislation for that purpose the State erred in duty or has infringed the constitutional right of anyone. On the contrary, it may reasonably be affirmed that a duty rests upon each State in every legal way to encourage its people to love the Union with which the State is indissolubly connected." (*Id.* at 43, 27 S. Ct. at 422.)

Although *Halter, supra,* was concerned with the use of a representation of the flag in an advertising scheme, the case is nevertheless pertinent because the statute therein involved contained language substantially analogous to the statute now before this Court.

It is also significant that many States have subscribed to the view that the flag of the United States merits respect as a symbol of Americanism, and "an object of patriotic adoration" (*Halter* v. *State,* 74 Neb. 757, 105 N.W. 298, 300 [1905].) Accordingly, the Legislatures of those States have promulgated legislation to protect its meaning.*

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* See *Halter* v. *Nebraska,* 205 U.S. 34, 39-40, 27 S. Ct. at 421, *supra.* Other states have since followed suit.

In *People* v. *Picking*, — Misc. —, 23 N.Y.S. 2d 148, 149 (N.Y. City Mag. Ct. 1940), *aff'd*, 263 App. Div. 366 (1st Dept. 1942), *aff'd*, 288 N.Y. 644 (1942), *cert. denied*, 317 U.S. 632 (1942), *rehearing denied*, 317 U.S. 708, 63 S. Ct. 156 (1942), the court referred to the instant statute as a "salutary one," and that "[i]ts aim is to hold up the dignity of the American Flag, the Flag that is the hope of the world and the Symbol of what perhaps is the last true democracy on the face of the earth, today." The Court of Appeals affirmed the judgment of conviction of the trial court and upheld the constitutionality of the statute without opinion. The conduct condemned by the trial court had been one which involved the placing of an advertisement on a car in close proximity to the flag of the United States.

Section 1425, subdivision 16, of the Penal Law, *supra*, has been the subject of interpretations through the years. In 1934, Hon. John J. Bennett, Jr., as Attorney General of the State of New York, advanced the opinion that the "intent of the legislature in enacting Section 1425 was to insure that the use of the Flag of the United States, or of the representation thereof be appropriate and respectful." (See 51 N.Y. State Dept. Rep. 240 [1934].) "The statute is comprehensively designed to prevent desecration of the Flag . . . of the . . . United States." (See 1941 N.Y. Att'y Gen. Rep. 465)

Any contention that Sec. 1425, subd. 16, para. d, of the Penal Law, *supra*, is inconsistent with 36 U.S.C.A., Section 176(j),* and, thus, violative of the Supremacy Clause of the United States Constitution, would be inappropriate.

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* 36 U.S.C.A., Sec. 176(j): "The flag, when it is in such condition that it is no longer a fitting emblem for display, should be

There is no provision in the federal law which prohibits a State from enacting and enforcing legislation designed to prevent disrespect to a symbol of Americanism.* The American flag is as much a part of a State as it is of the Nation. Any contempt cast on it also affronts the dignity and well-being of a State. (*Halter* v. *Nebraska, supra.*)

That a State has the power to so legislate was succinctly expressed by Mr. Justice Harlan in *Halter* v. *Nebraska,* 205 U.S. 34, 27 S. Ct. 419, *supra,* as follows:

> "In our consideration of the questions presented we must not overlook certain principles of constitutional construction, long ago established and steadily adhered to, which preclude a judicial tribunal from holding a legislative enactment, Federal or state, unconstitutional and void, unless it be manifestly so. Another vital principle is that, except as restrained by its own fundamental law, or by the Supreme Law of the Land, a State possesses all legislative power consistent with a republican form of government; therefore, each State, when not thus restrained, and so far as this court is concerned, may, by legislation, provide not only for the health, morals and safety of its people, but for the common good, as involved in the well-being, peace, happiness and prosperity of the people." (*Id.* at 40-41, 27 S. Ct. at 421.)

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destroyed in a dignified way, preferably by burning. June 22, 1942, c. 435, sec. 4, 56 Stat. 379; Dec. 22, 1942, c. 806, sec. 4, 56 Stat. 1076." This subdivision is prefaced by the language, "No disrespect should be shown to the flag of the United States of America . . . ."

* In fact the statute formulated as the result of Hearings before Subcommitte No. 4 of the Committee of the Judiciary, House of Representatives, 90th Congress, 1st Session, 1967, Report No. 350, wisely dispels any doubt in this regard by expressly reserving to the "State, territory, possession of the Commonwealth of Puerto Rico . . . jurisdiction over any offense over which it would have jurisdiction in the absence of this section" (H.R. 10480, chapter 33, title 18, U.S.C.A., Sec. 700, subsec. [c]).

"It may be said that, as the flag is an emblem of National sovereignty, it was for Congress alone, by appropriate legislation, to prohibit its use for illegitimate purposes. We cannot yield to this view. If Congress has not chosen to legislate on this subject, and if an enactment by it would supersede state laws of like character, it does not follow that, in the absence of National legislation, the State is without power to act. There are matters which, by legislation, may be brought within the exclusive control of the General Government, but over which, in the absence of National legislation, the State may exert some control in the interest of its own people. . . . [A] State may exert its power to strengthen the bonds of the Union and therefore, to that end, may encourage patriotism and love of country among its people. When by its legislation, the State encourages a feeling of patriotism towards the Nation, it necessarily encourages a like feeling towards the State. One who loves the Union will love the State in which he resides, and love both of the common country and of the State will diminish in proportion as respect for the flag is weakened. Therefore a State will be wanting in care for the well-being of its people if it ignores the fact that they regard the flag as a symbol of their country's power and prestige, and will be impatient if any open disrespect is shown towards it." (*Id.* at 41-42, 27 S. Ct. at 421-22.)

In *Ex parte Starr*, 263 F. 145, 146 (Dist. Ct., Mont. 1920), it was held that a State statute was not pre-empted by Federal legislation which "neither pardons the offense nor draws it within Federal jurisdiction."

It is noteworthy that a statute similar to the instant one was passed in the District of Columbia in 1917 (4 U.S.C.A., Sec. 3).

See 36A, C.J.S., 746, sec. 2, (Flags: Laws Relating to United States or State Flags).

In fine, both the New York and federal statutes do not conflict with each other since both are designed to prohibit that conduct for which the appellant herein was tried and found guilty.

It is the appellant's contention that the statute herein involved, designed to protect the flag of the United States, estops persons from "communicating, by actions relating to that symbol, a contrary message" (Jurisdictional Statement, p. 11), and "not only deprives persons of the rights guaranteed them by the First Amendment but deprives society of its most effective means for self-correction" (Jurisdictional Statement, p. 12). This, stresses the appellant, occurs when it is sought to "choke off the *peaceful,* though non-verbal, means by which . . . citizens can make their message known . . . (Jurisdictional Statement, p. 12, emphasis supplied). Yet in the cases relied upon by the appellant (*Edwards* v. *South Carolina,* 372 U.S. 229, 235, 236, 83 S. Ct. 680, 683, 684 [1963]; *Peterson* v. *City of Greenville* [South Carolina], 373 U.S. 244, 247, 83 S. Ct. 1119, 1121 [1963]; *Williams* v. *Wallace,* 240 F. Supp. 100, 104-05 N.D. Ala. [1965]; *Brown et al.* v. *Louisiana,* 383 U.S. 131, 141-42, 86 S. Ct. 719, 723-24 [1966]), the acts evinced therein were those of "peaceful" conduct.

Accord, Stromberg v. *California,* 283 U.S. 359, 366, 51 S. Ct. 532, 534 (1931); *Thornhill* v. *California,* 310 U.S. 88, 94, 60 S. Ct. 736, 740 (1940); *Carlson* v. *California,* 310 U.S. 106, 110-11, 60 S. Ct. 746, 748 (1940); *West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624, 63 S. Ct. 1178 (1943), *supra; Garner* v. *Louisiana,* 368 U.S. 157, 170, 172,

82 S. Ct. 248, 255, 256 (1961), wherein the various acts depicted were likewise not beset with agitation.

The appellant's behavior in burning a symbol of Americanism in a public place, while simultaneously spewing words of contempt, was not an act of "peaceful" expression entitled to constitutional protection. This act of "violence,"* regardless of its degree, cannot be protected albeit the appellant verbally expressed views such as, "We don't need no damn flag," and, "If they let that happen to Meredith we don't need an American flag" (11). (Compare *Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490, 498, 502, 69 S. Ct. 684, 688-89, 690-91 [1949], wherein it was held that violence or other unlawful conduct will not be protected "merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.")

Accord, Cox v. *Louisiana,* 379 U.S. 536, 555, 85 S. Ct. 453, 464-65 (1965); Same parties, 379 U.S. 559, 564, 85 S. Ct. 453, 480-81 (1965).

Yet, even if we are to assume, *arguendo,* that the conduct of the appellant was expression by symbolic speech, it is respectfully reiterated, nevertheless, that from its very nature, attaching to it the protection accorded by the First Amendment to the United States Constitution would be unwarranted. Symbolic speech has never been given the same significance as the written or spoken word. As stated by Mr. Justice Goldberg in *Cox* v. *Louisiana,* 379 U.S. 536, 555, 85 S. Ct. 453, 464-65 (1965), *supra*:

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* "Violence" is defined as follows: 1a: exertion of any physical force so as to *injure or abuse* . . . , 2: injury in the form of revoking, *repudiation* . . . or *irreverence to a thing* . . . , 3b: *vehement feeling or expression.* . . ." (Webster's New Int. Dictionary [3rd ed. 1964] [emphasis supplied].)

> "We emphatically reject the notion . . . that the First and Fourteenth Amendments afford the *same kind of freedom* to those who would communicate ideas by conduct such as patrolling, marching and picketing on streets and highways, as these amendments afford to those who communicate ideas by pure speech." (Emphasis supplied.)

In a more recent case, this Court, in a majority holding, rejected the argument that "people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please." (See *Adderley* v. *Florida,* 385 U.S. 39, 47-48, 87 S. Ct. 242, 247 [1966] [Black, J.].)

Thus, Mr. Justice Black has also drawn a line between speech and conduct.

See also, *People* v. *Stover,* 12 N.Y. 2d 462 (1963), *appeal dismissed,* 375 U.S. 42 (1963) (symbolic expression "offending sensibilities"); *People* v. *Martin,* 15 N.Y. 2d 933 (1965), *cert. denied,* 382 U.S. 828 (1965) (sit-in); *People* v. *Penn,* 16 N.Y. 2d 581 (1965), *cert. denied,* 383 U.S. 969 (1966) (picketing).

To reiterate, "peaceful" acts of protest have been recognized as permissible. Appellant states that "those who have greatest cause to protest are those who, by reason of economic and educational deprivation, do not have access to the mass media and cannot undertake the lobbying activities of better endowed groups . . . [and] [p]ublic demonstrations symbolizing their grievances are often their only recourse" (Jurisdictional Statement, p. 9). This can be no license for conduct deemed "violent" in nature for such disadvantaged persons ofttimes have their desire for pro-

test satisfied by eloquent and articulate champions of their causes who command respect and who are successful in attaining worthwhile goals. It would now appear that any differences in the "access to the mass media" and "lobbying activities" between such persons and "better endowed groups" is negligible indeed. There is no desire to choke off *responsible* expression, verbal or non-verbal, and public desecration of the flag of our Country, contrary to the view of appellant, can never be an effective means of society's self-correction, but can only lead to destruction. (See Jurisdictional Statement, pp. 11-12.)

Any contention that the instant statute is tantamount to a "prior restraint" of speech, and therefore constitutionally objectionable, is without merit. The statute, being a narrowly-drawn one, does not leave in an unreasonable and discriminatory fashion the determination as to what "words or act" will violate its terms. (Compare *Lovell* v. *Griffin,* 303 U.S. 444, 58 S. Ct. 666 [1938]; *Cantwell* v. *Connecticut,* 310 U.S. 296, 60 S. Ct. 900 [1940]; *Saia* v. *New York,* 334 U.S. 558, 559-60, 68 S. Ct. 1148, 1149-50 [1948]; *but cf. Kovacs* v. *Cooper,* 336 U.S. 77, 82-83, 69 S. Ct. 448, 451 [1949]).

See also, *Tenney* v. *Liberty News Distributors, Inc.,* 27 Misc 2d 692, 211 NYS 2d 733 (Sup. Ct. 1960).

It is the appellant's contention that his act of desecrating the flag in the manner he did "is not an 'incitement to riot,' was was found to exist in *Feiner* v. *New York,* 340 U.S. 315 (1940)," or within the " 'clear and present danger' which would authorize interference with his First Amendment rights" (Jurisdictional Statement, p. 15).

It would appear that the appellant seeks to rely solely upon the application of such tests to the facts in the instant appeal. Notwithstanding this, however, it is the appellees' respectful submission that other tests are equally applicable.

The classic "clear-and-present-danger" test is succinctly set forth in *Schenck* v. *United States*, 249 U.S. 47, *supra*, at 52, 39 S. Ct. at 249 (1919),* when Mr. Justice Holmes expressed the view that "[t]he question in every case is whether the words used are used in such circumstances and and are of such a nature to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."

However, it now appears that in recent Supreme Court decisions, particularly in those matters involving narrowly-drawn statutes which on their face regulate conduct, rather than the communication of ideas, as in *Schenck*, the "clear-and-present-danger" test has been replaced with a "balancing-of-interests" test. Prior to then, and according to Mr. Justice Brandeis, who, as co-architect, amplified the "clear-and-present-danger" test, "no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an

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* *Schenck* involved mere speech as a means by which to accomplish sedition in time of war, and in violation of the Espionage Act of June 15, 1917. *Accord, Frowerk* v. *United States*, 249 U.S. 204, 39 S. Ct. 249 (1919); *Debs* v. *United States*, 249 U.S. 211, 39 S. Ct. 252 (1919).

emergency can justify repression." (See *Whitney* v. *California*, 274 U.S. 357, 377, 47 S. Ct. 641, 649 [1927], *supra*, [concurring opinion].) Yet, despite the views of Mr. Justices Holmes and Brandeis, it thereafter became necessary to apply a "balancing-of-interests" test by which "conduct [was] regulated in the interest of public order" so that it became necessary to allow the operation of a regulation albeit there was an "indirect, conditional, partial abridgement of speech." (See *American Communications Assn* v. *Douds*, 339 U.S. 382, 399, 70 S. Ct. 674, 684 [1950].)* Now the stage was set for the courts to decide which of two conflicting interests dictated the greater need for protection. The courts in applying this new formula would be required in each case to "balance the individual and social interest in freedom of expression against the social interest sought by the regulation which restricts expression." (See Emerson, *Towards a General Theory of the First Amendment*, 72 Yale L.J. 877, 912 [1963].)

Thus, in *Dennis* v. *United States*, 341 U.S. 494, 510, 71 S. Ct. 857, 868 (1951), *affirming* 183 F. 2d 201, 212 (2d Cir. 1950), four of the six members of the Court who joined in upholding the conviction, accepted Chief Judge Learned Hand's restatement of the "clear-and-present-danger" test,** thereby diluting it into a balancing test.

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* It was in *Douds* that Mr. Chief Justice Vinson first enunciated the "balancing-of-interests" test.

** The restatement by Judge Hand is inherent in the language: "In each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger. We have purposely substituted 'improbability' for 'remoteness,' because that must be the right interpretation. Given the same probability, *it would be wholly irrational to condone future evils which we should prevent if they were immediate;* that can be reconciled only by an indifference to those who come after us." (183 F. 2d at 212, emphasis supplied.)

That the "balancing" test has continued to maintain its effectiveness is evident from the holdings in *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449, 461, 78 S. Ct. 1163, 1171 (1958); *Barenblatt* v. *United States*, 360 U.S. 109, 126-27, 79 S. Ct. 1081, 1093 (1959); *Konigsberg* v. *State Bar*, 366 U.S. 36, 49-51, 81 S. Ct. 997, 1006-07 (1961); *United States* v. *Aarons*, 310 F. 2d 341, 345 (2d Cir. 1962);* and *United States* v. *Miller*, 367 F. 2d 72 (2d Cir. 1966), *cert. denied*, 386 U.S. 911 (1967).**

The "balancing-of-interests" test denies that any speech has an absolute right of protection under the First Amendment. That free speech is not absolute was also recognized by Mr. Justice Brandeis in *Whitney* v. *California*, 274 U.S. 357, 373, 47 S. Ct. 641, 647 (1927), *supra*, (concurring opinion).†

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* It is interesting to point out the court's statement (per Circuit Judge Friendly) that "[e]ven if we were to assume in appellant's favor that action designed 'to block the launching' constituted speech . . . , 'freedom of speech . . . does not comprehend the right to speak on any subject at any time', American Communications Assn v. Douds, 339 U.S. 382, 394 . . ." (310 F. 2d at 345.)

** Although it is respectfully submitted that the willful mutilation of a draft card is far less significant than the wanton destruction of a symbol of freedom, the *Miller* case condemns such an act nevertheless. (*But cf. United States* v. *O'Brien*, 376 F. 2d 538 [1st Cir. 1967] [now pending before this Court]). Since a draft card is the personal property of a registrant, the impact of burning it does not appear to be as serious as the desecration of the flag of the United States which belongs to the citizenry at large. See also, *Smith* v. *United States*, 368 F. 2d 529 (8th Cir. 1966).

† It is significant that in *Board of Education* v. *Barnette*, 319 U.S. 624, 643, 63 S. Ct. 1178, 1188 [1943], *supra*, Mr. Justices Black and Douglas stated that "[n]o well-ordered society can leave to the individuals an absolute right to make final decisions, unassailable by the State, as to everything they will or will not do. The First Amendment does not go so far."

Yet, even the "clear-and-present-danger" test as restated by Judge Hand in *United States* v. *Dennis* (2d Cir. 1950), 183 F. 2d 201, 212, *supra,* has not entirely lost its vitality for as one writer has observed:

> "Its essential features have been preserved, but adapted to the peculiar fact-situation presented by the menace of current Communist enterprise. In its new form the rule might be called the 'electric eye' theory of clear and present danger. The danger is deemed to exist if there is a present and continuing mechanism which upon the occurrence of appropriate conditions will trigger into activity a future operation which constitutes a danger of substantial magnitude." (See DUMBAULD, BILL OF RIGHTS AND WHAT IT MEANS TODAY 122 [1957], *supra.*)

Ought not the atmosphere of these times also prompt us to deem the application of such a test (as restated by Chief Judge Learned Hand) as equally appropos? Is not the appellant's act (although having affected the sensory perceptions of but a relatively small segment of our population on a Brooklyn street) *when taken with the manifold dangerous behaviorisms of our day,** *one which may "trigger into* activity a future operation which constitutes a danger of substantial magnitude?" Is the act less dangerous because its effect, unlike in *United States* v. *Dennis,* 341 U.S. 494, 71 S. Ct. 857 (1951), *supra,* does not *immediately* envelop a much larger audience? Does not the rebellion of the appellant have the same imminent devastating effect as the acts of Dennis and his followers?

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* See p. 30, *infra.*

The "clear-and-present-danger" test has never been a technical verbal formula. (See *Pennekamp* v. *Florida*, 328 U.S. 331, 352-53, 63 S. Ct. 1029, 1040 [1946] [Frankfurter, J., concurring].). And whether or not the modified test of Chief Judge Learned Hand be applied, it, too, as the "balancing-of-interests" test, can be practically considered in the instant appeal so that the appellant's act cannot escape the reprobation it so richly deserves. Is not an act such as committed by the appellant one which will "treasonably" lend aid and comfort to the enemy by strengthening its hand? Any failure to preserve law and order creates the clear and present danger that the expression involved, *symbolic or otherwise*, "will bring about the substantial evils that Congress has a right to prevent." (*Schenck* v. *United States*, 249 U.S., *supra*, at 52, 39 S. Ct. at 249 [1919].). The question of free expression must yield to the higher requirement that the United States of America must survive in the hostile atmosphere of a tumultuous present-day history. It is this vital need which makes even the words by the appellant, in derogation of the flag, without more, subject to criminal punishment. The danger of undermining the morale of our fighting men abroad by public acts of flag-desecration, whether by "words or act," will, if such misdeeds go unpunished, produce serious and disastrous consequences upon the well-being and security of the Nation. Circumstances appear again to have restored the *Schenck*, *Frowerk*, and *Debs* cases,* to a new vitality.

The American flag symbolizes everything dear to us, and is entwined within the very framework of our Bill of Rights.

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* *Schenck* v. *United States*, 249 U.S. 47, 39 S. Ct. 247 (1919), *supra*; *Frowerk* v. *United States*, 249 U.S. 204, 39 S. Ct. 249 (1919), *supra*; *Debs* v. *United States*, 249 U.S. 211, 39 S. Ct. 252 (1919).

The flag is a home away from home and throughout the world whenever an American chances to see it, the inspiration derived from its presence is immeasurable. To accord the appellant license to mistreat the flag is as implausible and inconceivable as a determination that one has a constitutional right to destroy the Constitution. For it was on June 14, 1777 that "Old Glory" was formally adopted by the Continental Congress as the national flag, and ". . . the flag like the nation itself, evolved slowly and painfully from small beginnings; that it was shaped by many hands and brains. . ." (Butterfield, *Foreword* to Quaife, Weig & Appleman, THE HISTORY OF THE UNITED STATES FLAG at 11 [1961].) To sanction the appellant's conduct as constitutionally-protected expression is to lend aid and comfort to those who seek to corrupt the very foundation of the liberties we seek to preserve. Thus, those liberties which are inherent in the wellspring of Democracy are demeaned and negated so that the cherished liberty of free speech, symbolic or otherwise, becomes slowly and undeniably destroyed, rather than perpetuated. Contempt and hatred are contagious and misanthropes, totalitarians, and malcontents harken to their call. To paraphrase Mr. Chief Justice Hughes, the excesses of free speech are apt to destroy free speech itself, unless properly fettered. (See *Cox* v. *New Hampshire*, 312 U.S. 569, 574, 61 S. Ct. 762, 765 [1941].) The appellant by his conduct was in a manner openly inviting others to share his contempt for the flag and the country it represents. It is in these times, especially, that honor to the flag must be given its fullest meaning. To condone the public disapprobation of a symbol of America itself is (especially when combined with such present-day events as the assassination of a President, destroying of draft cards, wholesale evacuations

to Canada to avoid military service for the United States, student riots in Ft. Lauderdale and other sections of our Nation, conflagrations and disturbances in socially and economically-disadvantaged areas, emergence of a "hippie" generation, open contempt for decorum on the part of elected officials in positions of trust, rise in crime statistics, activities of extremist groups, the new "palliative" (?) world of LSD and its psychedelic adventures)* a vivid portrait of disrepect for our institutions. Society may soon find it exceedingly onerous to withstand the challenges of an era of arrogance. Can anyone of us, today, honestly and confidentally take the position that the appellant's act of defiantly burning the flag, if ignored, will not ignite the spark which will flare into chaos and rebellion tomorrow? One need not be a prophet of doom to state that we must look at reality with a circumspect eye. It would be the height of naiveté to say that we are living in a predominantly patriotic society free from undermining influences. It would appear reasonable to state that we are part of a society which consists of a significant populace who either have chaotic and anarchic thought, on the one hand, or, who harbor cold indifference, on the other. To legitimatize the appellant's unforgiveable act is to draw the attention of the world to our problems, with ensuing disrespect. Certainly there can be no reverence for a flag that can be defiled and treated with contempt. Nor will there be any meaning left for the

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* In the light of these events which have occurred in our Country in recent times, it would not be unreasonable to question the appellant's statement that "we have long since passed the era that the threat of an angry crowd, or resentment by the listener against what is said, is a substantive reason for enactment of a statute that on its face restricts free speech" (Jurisdictional Statement, p. 15).

flag which draped the caskets of those who shed their lives for our Nation, and inspired countless deeds of glory. To dignify the appellant's conduct is to reduce the flag to an empty piece of cloth, and to transform it from meaningfulness to meaningless ornament. If the flag is now to take on merely an ornamental significance, then can it not be said that those who have shed their lives for it were not only duped by it, but that it has made a mockery of patriotism? *It cannot be denied that to scorn a flag is to erode a nation!*

There is a public interest in having our flag waving as a symbol of the United States. Disrespect for it is inimical to the public welfare and can only encourage others to do the same. The flag must continue to remain in an exalted position as symbolic of unity, strength, and friendly recognition. Where healthy criticism may help to correct, the appellant's act can only chip away at the pillars of democracy.

Insofar as the appellant's act is concerned, patriotism cannot take a "back seat" to any purported right of free expression the appellant now seeks to assert. His conduct, if unchecked, will further debilitate and debauch public morals, for it transcends permissive expression.

While such cases as *West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624, 63 S. Ct. 1178 (1943), *supra,* hold that one need not salute the flag, it does not follow from such a determination that it can become the proper subject of desecration, or upon which to cast calumny. The statute extirpated in *Barnette, supra,* compelled positive action of saluting the flag. The present statute does not require any affirmative action nor does it prescribe orthodox conduct. It simply forbids public acts of dishonor

to the flag of the United States. The right to communicate ideas or engage in political dissent or protest in a *responsible* manner remains unimpaired. The encouraging of reverence and respect for the flag is not to be equated with "compelling an expression of belief in violation of the First Amendment" (Jurisdictional Statement, p. 15). Such encouraging becomes instilled in others when "words or act[s]" of defilement of the flag are not caused to be impressed upon their senses.

It would be ironic indeed to maintain that we have a duty to punish those who "bring into public odium any foreign government . . . or bring into public disrepute its political, social, or economic acts or views" (see *Frend* v. *United States*, 100 F. 2d 691, 692 [D.C. Cir. 1938]), without conceding that we have the correlative obligation of similarly punishing those whose acts are also as offensive to us, particularly when the act complained of is the burning of our cherished flag. (See N.Y. Times, April 11, 1967, p. 8, col. 1, wherein it was reported that oral protest was presented by Robert H. McBride, the United States Embassy Minister, to Jacques de Beaumarchais, director of Political Affairs at the Foreign Ministry, for the flag-burning incident in Paris on April 7, 1967.)

To vindicate the appellant's right to express himself in the manner he did, if indeed it be deemed symbolic speech, is to create an "open sesame" to like conduct. On the other hand, to condemn the appellant's act, as it should be, will not be a sign of fanaticism but, rather, of patriotism. (Compare *ex parte Starr*, 263 F. 145 [Dist. Ct., Mont. 1920], *supra*.) It is the appellees' respectful submission that there is a danger to organized government in defiling

its flag, notwithstanding appellant's contrary view (See Jurisdictional Statement, p. 15).

In fine, we must protect our country at all times. The anticipation of an attempt to overthrow our basic tenets of democracy by arrogant behavior designed to flaunt our institutions, and flag-burning is such an attempt, must be our prime concern. We cannot afford to experiment by permitting all acts and words denigrating our basic philosophies to freely reach the marketplace of ideas. The vitality of such a view was inherent in the determination of *Dennis* v. *United States*, 341 U.S. 494 (1951), *supra*, at 509-10, 71 S. Ct. at 867, when it was succinctly stated:

> "We must reject . . . the contention that success or probability of success [to overthrow the Government] is the criterion." (Concurring opinion.)

In another landmark case, this Court declared:

> "[T]he immediate danger is none the less real and substantial, because the effect of a given utterance cannot be accurately foreseen. The State cannot reasonably be required to measure the danger from every such utterance in the nice balance of a jeweler's scale. A single revolutionary spark may kindle a fire that, smouldering for a time, may burst into a sweeping and destructive conflagration. It cannot be said that the State is acting arbitrarily or unreasonably when in the exercise of its judgment as to the measures necessary to protect the public peace and safety, it seeks to extinguish the spark without waiting until it has enkindled the flame or blazed into the conflagration; . . . it may in the exercise of its judgment, suppress the threatened danger in its incipiency." (*Gitlow* v. *New York*, 268 U.S. 652, 669, 45 S. Ct. 625, 631 [1923], *supra*, [Sanford, J.].)

To paraphrase *Gitlow, supra,* are we required to wait for an epidemic to break out before the doctor is summoned?

The appellant's right as a citizen to criticize his country and to effectively participate in public affairs is not denied him by the fact that Sec. 1425, subd. 16, para. d, of the Penal Law of the State of New York, *supra,* also bars the use of "words" as well as "act" in the interdicted conduct affecting the flag of the United States. The use of "words" which "defile or defy . . . . or cast contempt" upon the flag "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is greatly outweighed by the social interest in order and morality." (See *Chaplinsky* v. *New Hampshire,* 315 U.S. 568, 572, 62 S. Ct. 766, 769 [1942]; CHAFEE, FREEDOM OF SPEECH 170 [1920].) The statute, being narrowly drawn, does not violate any constitutional mandates regarding the right to enjoy freedom of speech. And if there be any doubt as to the constitutional propriety of including "words" within the prohibition of the statute, which we do not anticipate (for the reasons already presented, and especially when we note the rebellious nature of the words employed herein simultaneously with the act performed), that doubt can easily be resolved by excising that language and leaving inviolate the punishment of the act of which the appellant was accused, except insofar as the language employed spelled out the "contempt" displayed by him.

> "[C]ourts will exert themselves to save part of a statute, and if valid and invalid provisions are incorporated in the same act, the former, if separable, will be upheld though the latter must fall . . ." (McKinney's Cons. Laws of N.Y., Book 1, Statutes, pp. 237-38, Section 150 and cases cited therein).

See also, *People ex rel. Alpha P.C. Co.* v. *Knapp*, 230 N.Y. 48, 60, 62-63 (1920) (Cardozo, J.), *rearg. denied*, 231 N.Y. 516 (1921), *cert. denied*, 256 U.S. 702, 41 S. Ct. 624 (1921).

Nor can any view that the instant statute has for its purpose the encouragement of adhering to symbols be accepted as sound. As aptly stated by Mr. Justice Frankfurter in *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624, 63 S. Ct. 1178 (1943), *supra*:

> "We are told that symbolism is a dramatic but primitive way of communicating ideas. Symbolism is inescapable. Even the most sophisticated live by symbols. *But it is not for this Court to make psychological judgments as to the effectiveness of a particular symbol in inculcating concededly indispensable feelings, particularly if the state happens to see fit to utilize the symbol that represents our heritage and our hopes.*" (*Id.* at 662, 63 S. Ct. at 1196, dissenting opinion, emphasis supplied.)

The appellant's reference to "symbols of sovereignty," and the extent to which free expression may be restricted in order to protect them, is not entirely accurate (Jurisdictional Statement, p. 7). The flag is better described as a symbol of "our heritage and our hopes."

Although the Court of Appeals of the State of New York predicated its determination upon the view that the statutory purpose of the statute was to "prevent the outbreak of . . . violence by discouraging contemptuous and insulting treatment of the flag in public" (*People* v. *Street*, 20 N Y 2d 231, 236 [1967], *supra;* Jurisdictional Statement, pp. 6a, 7a), and as was emphasized in *People ex rel. McPike* v. *Van De Carr*, 91 App. Div. 20, 26 (1st Dept. 1904),

aff'd, 178 N.Y. 425 (1904)*, *supra*, it was our position at the time of argument in the Court of Appeals, and to which we respectfully still adhere, that what is *also* apparent is that the contemptuous treatment of the flag of the United States of America,** which would shock the conscience of any true American, nay, of any decent person, is serious enough, *per se*, to be treated as a misdemeanor and punishable if committed "publicly."

It is the public display of such ignominious conduct which accentuates the danger of the act, not only from a "breach-of-the-peace" sense, but from the ineffaceable debasing effect, however slight, such desecration may have upon another's respect for the symbol of our cherished liberties, if what is thus seen goes unpunished.

What can be gained by abusing our flag under the guise of unfettered expression? Certainly, the harm that will result greatly outweighs the need for constitutional protection that is sought for such expression. An act of contempt done in public, as in this case, is condemnable because it demeans our flag in the eyes of others, and detracts from

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* See also, *Halter* v. *Nebraska*, 205 U.S. 34, 41, 27 S. Ct. 419, 421 (1906), *supra*. But see *People* v. *Picking*, Misc. , 23 N Y S 2d 148, 149 (N.Y.C. Mag. Ct. 1940), *aff'd*, 263 App. Div. 366 (1st Dept. 1942), *aff'd*, 288 N.Y. 644 (1942), *cert. denied*, 317 U.S. 632 (1942), rehearing denied, 317 U.S. 708 (1942), *supra*, where the court indicated that the aim of the statute was to "hold up the dignity of the American Flag . . ."

** It appears obvious that for the purposes of the statute herein involved, any asserted claim of "title" to the flag by a defendant would be meaningless. The flag, as such, like money, is the unique property of the United States of America and its citizens as a whole, except that the proper use of it by individuals is encouraged. The material ownership of the flag, although in the appellant, must yield to the stronger spiritual right to it as vested in our land and its citizens.

the respect one would ordinarily show for the flag if he were not "treated" to such a spectacle. It may even encourage others to perform similar, or as equally unforgiveable, acts against the flag of our Nation. Thus, in order to preserve the sanctity of the flag, the Legislature of the State of New York* wisely provided that an act such as committed by the appellant herein would suffer punishment if done "publicly." It is interesting to note that "contempt" is defined as follows:

> "4a: wilful disobedience to or *open* disrespect of the valid rules, orders, or process or the dignity or authority of a court or a judge acting in a judicial capacity . . ." (Webster's New Int. Dictionary [3rd ed. 1964] [emphasis supplied].)

It is noteworthy that Sec. 1425, subd. 16, para, d, of the Penal Law of the State of New York, *supra,* sets forth conduct violative of Article 134, which has for its sole purpose the prohibition of various forms of conduct, specified in detail, and described as "Malicious Mischief." All of this has been superseded by L. 1965, c. 1031, sec. 52, eff. Sept. 1, 1967, and further identified as Section 136 of the General Business Law of the State of New York. This would indicate an *additional* legislative purpose to protect the flag from public desecration *dehors* any desire to prevent a breach of the peace. Otherwise, many acts of desecration would escape punishment because of the difficulty in showing that a breach of the peace occurred, or might have been occasioned (*i.e.,* when the flag is used for advertising purposes). The proscription, therefore, is two-pronged.

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* See 51 N.Y. State Dept. Rep. 240 (1934), and 1941 N.Y. Att'y Gen. Rep. 465, *supra.*

Thus, "open," which is synonymous with "public," when considered in the light of the above definition of "contempt," lends significance to the view that punishment in the instant case is mandated, not only for a "breach of the peace" or its likelihood, but, also, for the act of disrespect, in and of itself. The contempt of the type shown in the above dictionary meaning does not need to rest upon any consideration of "breach of the peace," since what is punished is the "demeaning" of, or casting disrespect upon, a court and judge in the presence of others who comprise the "public." And so it is with the instant statute; it is the contumelious conduct toward the flag of the United States in the presence of others which we seek to reproach so that a symbol of our liberties is not relegated to a state of opprobrium.*

It must not be overlooked that there was a strong probability indeed that the appellant's act could easily have resulted in a breach of the peace. A war veteran, for example, would not be likely to be insensible to the sight of the appellant's desecration of the flag.

Had not the police officer chanced to be nearby, there would have been a grave possibility that the impact of the appellant's conduct might have penetrated the recesses of the minds of some of those passersby in that socially and economically-disadvantaged area, and thus incited violent action favoring the appellant's act. Such an occurrence is not too remote when we consider the various disturbances throughout the Country in recent times. That it did not happen, though fortunate, is of no import, for, to reiterate, there

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* See *State* v. *Peacock*, 25 A. 2d 491 (Sup. Jud. Ct., Maine, 1942) (court's charge regarding "publicly" held erroneous).

was a likelihood of it, and, in any event, the appellant's "contempt" for the flag "publicly" warrants punishment under the statute.

Appropriate, indeed, is the language of Mr. Justice Douglas who, in recognizing that conditions may affect behavior, stated in *Dennis* v. *United States*, 341 U. S. 494, 71 S. Ct. 857 (1951), *supra*:

> "In days of trouble and confusion, when bread lines were long, when the unemployed walked the streets, when people were starving, the advocates of a short-cut by revolution might have a chance to gain adherents." (*Id.* at 588, 71 S. Ct. at 906, dissenting opinion.)

Appellant's contention that the statute does not define with sufficient clarity the words or acts proscribed, thus sweeping within its ambit conduct both innocent and criminal (see Jurisdictional Statement, pp. 13-14, 16-17), is belied by the very verbiage of the enactment. The statute is concise and provides that no person "[*s*]*hall publicly mutilate, deface, defile or defy, trample upon, or cast contempt upon either by words or act . . . the flag of the United States of America,*" and that the object which the statute protects from desecration is one "upon which shall be shown the colors, the stars and the stripes . . . or by which the person seeing the same, without deliberation, may believe the same to represent the flag . . . of the United States of America." (Sec. 1425, subd. 16, para. d, of the Penal Law of the State of New York, *supra*). There is no doubt as to what was intended to be forbidden at the time the statute was enacted. The words "defile," 'defy," "cast contempt," are

sufficiently clear to apprise a person of the conduct the subject statute is intended to ban.

> "[A] criminal statute must be sufficiently definite, clear and positive to give unequivocal warning to citizens of the rule which is to be obeyed. It is also true, of course, that all presumptions and intendments favor the validity of a statute and mere doubt does not afford sufficient reason for a judicial declaration of invalidity.
>
> * * * * *
>
> "The test is whether a reasonable man subject to the statute would be informed of the nature of the offense prohibited and what is required of him." (See *People* v. *Byron*, 17 N Y 2d 64, 66, 67 [1966] [Keating, J.].)

And, also:

> "The clarity and certainty necessary to satisfy constitutional requirements may be acquired . . . by reference to the context in which the term is used." (See *People* v. *Merolla*, 9 N Y 2d 62, 66 [1961] [Froessel, J.].)
>
> "All parts of a statute are to be construed together . . ." (McKinney's Cons. Laws of N.Y., Book 1, Statutes, Section 130 and cases cited therein; see also, Section 141, same authority.)

In *United States* v. *Wurzbach*, 280 U.S. 396, 399, 50 S. Ct. 167, 169 (1930), Mr. Justice Holmes aptly stated:

> "Whenever the law draws a line there will be cases very near each other on opposite sides. The precise course of the line may be uncertain, but no one can come near it without knowing that he does so, if he thinks, and if he does so it is familiar to the

criminal law to make him take the risk. *Nash* v. *United States*, 229 U.S. 373."

To the same effect, see *United States* v. *Petrillo*, 332 U.S. 1, 7-8; 67 S. Ct. 1538, 1542 (1947).

In *State* v. *Schlueter*, 127 N.J.L. 496, 23 A. 2d 249 (Sup. Ct., New Jersey 1941) the court, in affirming defendant's conviction as the result of her conduct (she was a self-confessed Nazi) in tearing and crumpling a small American flag and throwing it to the ground, stated:

> "We understand that the statute, in making it a misdemeanor to deface or to defile the flag, used those words in their meaning of 'dishonor'. 'Dishonor' is purposeful. The word implies a lively sense of shaming or an equivalent acquiscent callousness. For illustration: a blind man stumbles over the flag and, not knowing what it is, walks upon it and then casts it aside. Has he 'trampled' upon the flag? Has he 'defaced' or 'defiled' it? Has he 'dishonored' it? We think not; because those words carry with them, by inherent meaning, an attitude of mind . . ." (*Id.* at 250-51.) (Case, J.)

The statute herein involved does not create any "[b]lurred signposts to criminality" (*United States* v. *Congress of Industrial Organizations*, 335 U.S. 106, 142, 68 S. Ct. 1349, 1367 (1948)) since it is narrowly drawn to encompass the exact purpose of the statute—to assure responsible actions and judicious dissent insofar as the flag of the United States of America is concerned.

Appellant's reliance on *Baggett* v. *Bullitt*, 377 U.S., 360, 84 S. Ct. 1316 (1964), is inappropriate. (See Jurisdictional Statement, pp. 16-17.) The "range of activities" referred

to in *Baggett, supra,* at 371, 84 S. Ct. at 1322, which might be considered disrespect following the taking of oaths by teachers, said oaths designed to combat subversive conduct, cannot be equated with "words or act[s]" (Sec. 1425, subd. 16, para. d, of the Penal Law of the State of New York, *supra*) aimed at desecrating our flag. To reiterate, the statute does not require any positive conduct and is, therefore, unlike the one in *West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624, 63 S. Ct. 1178 (1943), *supra,* which required saluting the flag. An intent to dishonor the flag is easily recognizable for it is not left to surmise.

It is undeniable that the appellant by his statements at the time of the burning meant to degrade and lessen the esteem for the flag of our Country, and by the act of burning it in a public place, intended that others should share the same feelings with him. It was this fear which prompted the New York Legislature to pass the statute so many years ago (derived from Chap. 272, Sec. 1, of the Laws of 1903).

Appellant's reliance on *Winters* v. *New York,* 333 U.S. 507, 68 S. Ct. 665 (1948), is not well taken. In *Winters, supra,* a reading of Section 1141(2) of the Penal Law of the State of New York (Obscene Prints and Articles), as it then read, indicated to the United States Supreme Court that the statute would be difficult to enforce since it would create a problem in determining when such material would be interdicted by the statute. There was a possibility that collections of other stories, otherwise unexceptional, might also be considered "massed" so as to become "vehicles for inciting violent and depraved crimes." (*Id.* at 520.) In the instant appeal no such problem exists for the statute herein involved is clear as to the type of conduct proscribed so

that innocent acts affecting the flag of the United States of America are not brought within its ambit. (See e.g., *State* v. *Schlueter*, 127 N.J.L. 496, 23 A. 2d 249 [Sup. Ct., New Jersey 1941], *supra*.)

To reiterate, the instant statute concisely apprises the public of the conduct intended to be prohibited and clearly mandates law enforcement officers of their duty to prevent its breach. (See *Giacco* v. *Pennsylvania*, 382 U.S. 399, 402-03, 86 S. Ct. 518, 520-21 [1966]. Compare *Lambert* v. *California*, 355 U.S. 225, 78 S. Ct. 240 [1957].) Since its wording does not becloud the sanctions inherent therein, there is no violation of the due process clause of the Fourteenth Amendment.

In concluding, it is respectfully prayed that no constitutional guarantee be permitted to shield the appellant's act from punishment, and whether this Court shall, or shall not, attach the quality of symbolic expression to the burning of the flag of the United States, it is, nevertheless, so patently offensive to, and "sacrilegious" of, the deep traditional feelings of the American and the very spirit of this Country's history, that it would be unthinkable to shelter such conduct under the protective mantle of our treasured Constitution with which the flag is inseparably fused, so as to require the need for the First Amendment to be considered. To do that, would make constitutional guarantees the very means of self-annihilation!

> "This flag, which we honor and under which we serve, is the emblem of our unity, our power, our thought and purpose as a nation. It has no other character than that which we give it from generation to generation. The choices are ours. It floats in majestic silence above the hosts that execute those

> choices, whether in peace or war. And yet, though silent, it speaks to us—speaks to us of the past, of the men and women who went before us, and of the records they wrote upon it.'"*

It follows, therefore, that there is no substantial question which would warrant any further argument in this Court. Nor is there any basis for any claims that the pertinent statute, which satisfies constitutional requirements, is vague, ambiguous, indefinite, or overbroad so as to result in a deprivation of individual liberty without due process of law, in violation of the Fourteenth Amendment to the United States Constitution.

CONCLUSION

For the foregoing reasons, the appeal should be dismissed, or, in the alternative, that the order of the Court of Appeals of the State of New York appealed from, be affirmed.

Dated: Brooklyn, New York
January 2, 1968

Respectfully submitted,

AARON E. KOOTA
District Attorney
Kings County
Attorney for Appellees

HARRY BRODBAR
Assistant District Attorney
of Counsel

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* President Woodrow Wilson in a Flag Day address on June 14, 1917.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. [redacted] 5

SIDNEY STREET,

Appellant,

—v.—

PEOPLE OF THE STATE OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

BRIEF OF APPELLANT IN OPPOSITION TO RESPONDENT'S MOTION TO DISMISS THE APPEAL AS MOOT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 688

SIDNEY STREET,

Appellant,

—v.—

PEOPLE OF THE STATE OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

BRIEF OF APPELLANT IN OPPOSITION TO RESPONDENT'S MOTION TO DISMISS THE APPEAL AS MOOT

Appellant submits this Brief in opposition to respondent's motion to dismiss the appeal herein as moot.

I.

The conviction appealed from subjects appellant to collateral penalties which bring this case outside the doctrine of mootness.

The concept that a case is moot solely because a defendant who has been convicted of a crime is no longer subject to additional fine or imprisonment involves a dangerous fiction. In our society, where a man's background is care-

fully studied in thousands of collateral situations, the existence of a record of criminal conviction is no trifling matter. To many law abiding citizens, a criminal record would be a scar unjustly imprinted upon their lives. The decisions of this Court, therefore, have differentiated between those cases which are clearly moot, and those in which the defendant may suffer additional collateral penalties. Compare, *St. Pierre* v. *United States*, 319 U. S. 41 (1943) with *Fiswick* v. *United States*, 329 U. S. 211 (1946). Whenever the likelihood of additional collateral penalties has been demonstrated, this Court has refused to dismiss an appeal as moot.

In *Fiswick* v. *United States*, 329 U. S. 211 (1946), this Court refused to dismiss an appeal as moot because the possibility existed that immigration proceedings could be initiated against the defendant as a result of his conviction.

In *Pollard* v. *United States*, 352 U. S. 354 (1957), this Court stated:

> The possibility of consequences collateral to the imposition of sentence is sufficiently substantial to justify our dealing with the merits. *Pollard, supra*, at p. 358.

See also, *United States* v. *Morgan*, 346 U. S. 502 (1954).

In the instant case, as in *Fiswick, Morgan* and *Pollard*, there can be no doubt that the appellant faces serious collateral penalties based upon his conviction.

A. Transit Authority Disciplinary Proceedings

The appellant has been employed by the New York City Transit Authority for the past 20 years as a bus driver. On October 18, 1966, he was informed that Transit Au-

thority disciplinary proceedings had been initiated against him as a result of his criminal conviction. (A copy of the letter setting forth the charges preferred against appellant is reproduced in the Appendix to this Brief.) A hearing on the Transit Authority charges has been adjourned pending the disposition of this appeal. (A copy of the letter adjourning the disciplinary hearing *sine die* is reproduced in the Appendix to this Brief.) If the disciplinary charges are subsequently sustained, appellant faces the possibility of a $100 fine or a two month suspension without pay. It seems self evident, therefore, that the possibility of consequences collateral to the imposition of sentence is sufficiently substantial to justify this Court's dealing with the merits.

B. Additional Disabilities Caused by This Conviction

In addition to facing discipline by his employer, the appellant would sustain the following collateral disabilities as a result of his conviction:

(1) Section 393(c) of the New York Code of Criminal Procedure authorizes the use of appellant's conviction in rebuttal of any character testimony which appellant might adduce in any future criminal proceedings.

(2) Section 482 of the New York Code of Criminal Procedure requires that a record of appellant's conviction be made available to a judge prior to imposing sentence upon appellant in any possible future criminal prosecution.

(3) Section 510 of the New York Code of Criminal Procedure provides that if appellant is subsequently convicted of a felony, he may be sentenced as a "habitual criminal" by virtue of this prior misdemeanor conviction.

(4) The initiation of disciplinary charges against appellant by his employer indicates that his employment prospects have unquestionably been adversely affected by his conviction.

The collateral penalties and disabilities stemming from appellant's conviction are, therefore, sufficient to remove this case from the area of mootness.

II.

Dismissal of this case as moot will seriously interfere with attempts to define the scope of constitutionally protected conduct.

The very existence of a potential criminal prosecution, regardless of the formal sanctions involved, acts to deter many persons from engaging in conduct which may be constitutionally protected. It is, therefore, vital to clarify the limits of lawful behavior, even when less serious criminal sanctions are involved, in order to preserve to our people the opportunity to participate in the full spectrum of constitutionally protected conduct. By refusing to review as moot criminal convictions resulting in suspended sentences, this Court would not only prevent a defendant from vindicating his constitutional rights, but it would also refuse to define the scope of protected constitutional conduct in that area, thereby perpetuating the "chilling effect" of criminal proscriptions of doubtful constitutional validity.

CONCLUSION

This Court should not dismiss this appeal as moot, but rather should determine it on the merits.

Respectfully submitted,

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APPENDIX

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General Manager

NEW YORK CITY TRANSIT AUTHORITY
370 JAY STREET
Brooklyn 1, N. Y.
TELEPHONE ULSTER 2-5000 EXT.

SIDNEY BRAGINS
General Counsel

LEWIS PHILLIPS
Secretary

PLEASE REFER TO

400/EJB:eb

October 18, 1966

Mr. Sidney Street - Pass 865925
309 Lafayette Avenue
Brooklyn, New York

Charges are preferred against you as follows:

CHARGE: MISCONDUCT in that you violated Rules 4(a), 4(d), 11(g) and 11(h) of the Rules and Regulations Governing Employees Engaged in the Operation of the New York City Transit System.

SPECIFICATION: At all the times hereinafter set forth you were assigned as a Bus Operator to the Surface Transportation Department of said system.

On June 6, 1966 at about 7:00 PM on the corner of Lafayette Avenue and St. James Place, Brooklyn, N. Y., you were placed under arrest by the New York City Police and charged as follows:

(1) Malicious Mischief, a violation of section 1425-16D of the Penal Law in that you did wilfully and unlawfully, defile, cast contempt upon and burn an American Flag while shouting "If they did that to Meredith, we don't need an American Flag, and

(2) Disorderly Conduct, a violation of section 722.2 of the Penal Law in that you became loud and boisterous and by your actions caused a crowd to collect to the annoyance of persons in the vicinity.

Thereafter on July 26, 1966 in the Criminal court of Kings County you were found guilty of a violation of section 142-16-D of the Penal Law and the violation of section 722.2 of the Penal Law was dismissed.

2a

- 2 -

By direction of the New York City Transit Authority, YOU ARE HEREBY ORDERED to appear for a hearing on said charges before said Authority, by Hon. Daniel Gutman, Hearing Referee, designated in writing by Transit Authority resolution dated September 22, 1959, at its offices, No. 370 Jay Street, Brooklyn, N.Y., on the thirteenth floor, in the Hearing Room thereof, on Wednesday, November 9, 1966, at 9:00 AM, or at a later date to be fixed by said Authority. Your failure to appear on time on said November 9, may cause the above charges to be amended to include a charge of INSUBORDINATION.

If the charges are sustained, you will be punished by a Reprimand, a fine not to exceed One Hundred Dollars ($100.) to be deducted from your salary or wages, or by suspension without pay for a period not exceeding two months.

You are allowed eight (8) days from the receipt of this letter for answering the charges in writing. At the hearing on November 9, 1966, you may be represented by a Member of the Bar of the State of New York and will be permitted to summon witnesses in your behalf.

Lloyd Peterson

Lloyd Peterson
Secretary

NEW YORK CITY TRANSIT AUTHORITY
370 JAY STREET · BROOKLYN, N.Y. 11201

TELEPHONE ULSTER 2-5000

MENDERS
[redacted] CHAIRMAN
JOHN J. GILHOOLEY
DANIEL T. SCANNELL

WALTER L. SCHLAGER, JR.
GENERAL MANAGER
SIDNEY BRANDES
GENERAL COUNSEL
LLOYD PETERSON
SECRETARY

400/ [redacted]

September 28, 1967

Mr. Sidney Street - Pass 865985
309 Lafayette Avenue
Brooklyn, New York

Re: Hearing of Charges

This is to inform you that the hearing of charges preferred against you, previously scheduled for Wednesday, November 30, 1966, has been adjourned sine die.

By direction of the New York City Transit Authority, YOU ARE HEREBY ORDERED to appear for said hearing on , at , at the place set forth in said charges.

Lloyd Peterson
Secretary

cc: David T. Goldstick, Esq.

SUPREME COURT, U.S.
Office-Supreme Court, U.S.
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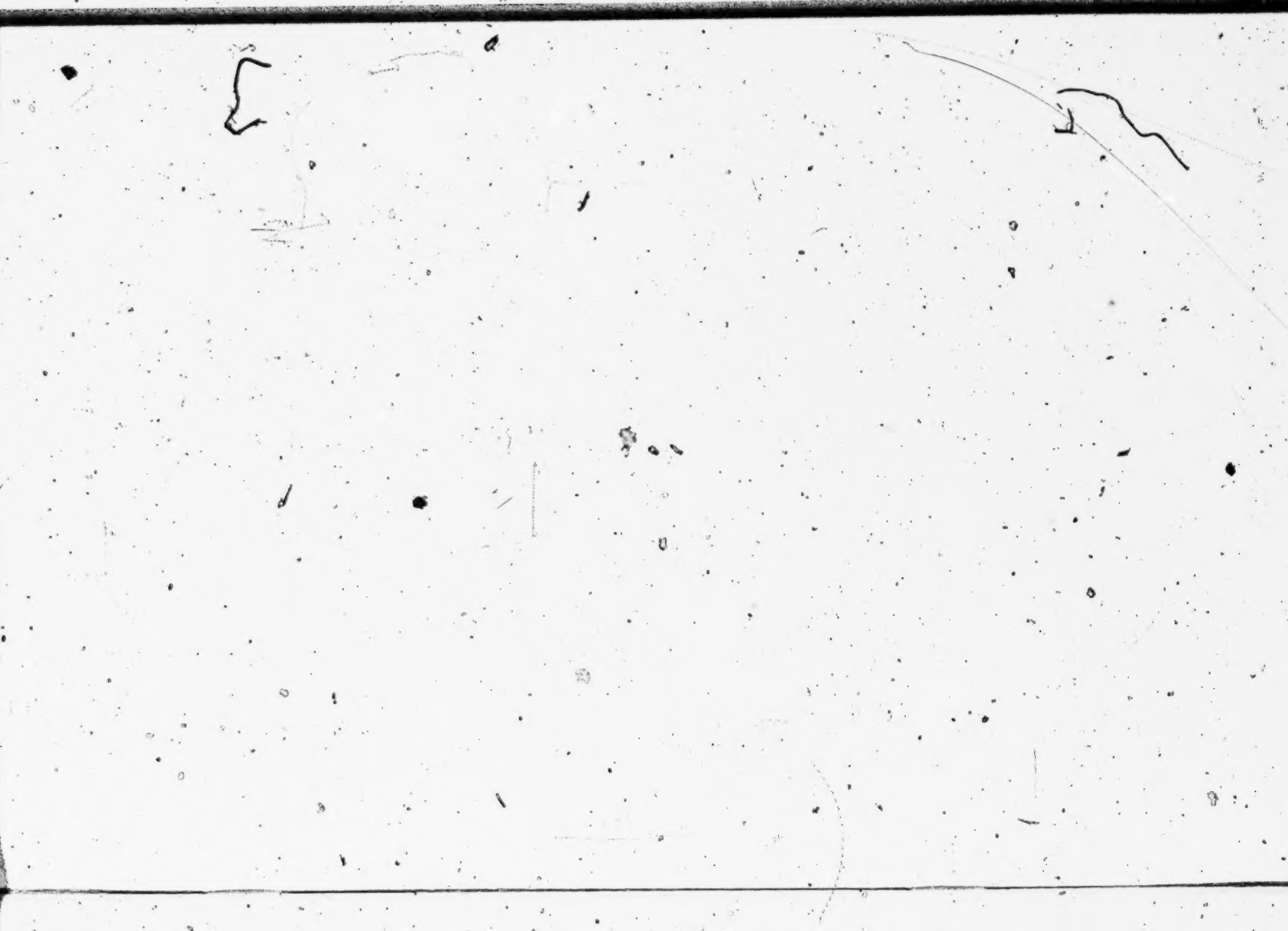

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 688

SIDNEY STREET,

Appellant,

—v.—

PEOPLE OF THE STATE OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

BRIEF OF APPELLANT

Opinions Below

The opinion of the New York Court of Appeals (A-3) is reported at 20 N. Y. 2d 231, 282 NYS 2d 491 (1967). Neither the Criminal Court of the City of New York (Kings County) nor the Appellate Term of the Supreme Court of the State of New York rendered an opinion herein.

Jurisdiction

The judgment of the New York Court of Appeals affirming the judgment of the Appellate Term of the Supreme Court of the State of New York which, in turn, had affirmed the judgment of conviction of the appellant by the Criminal Court of the City of New York (Kings County)

of a violation of Section 1425(16)(d) (malicious mischief) was entered on July 7, 1967. Appellant appealed to this Court on August 30, 1967. Probable jurisdiction was noted by this Court on June 17, 1968. 36 USLW 3483.

The jurisdiction of this Court rests on 28 U. S. C. Section 1257(2).

Questions Presented

1. Does New York's flag desecration statute violate the basic tenets of the "void for vagueness" doctrine in that it a) purports to sweep within its ambit conduct which is clearly protected by the First and Fourteenth Amendments; b) fails to afford adequate notice of the scope of its proscription and c) fails to provide adequate standards for enforcement?

2. May New York State constitutionally impose penal sanctions upon an individual charged with destroying or damaging an American flag in an attempt to dramatize his concern with social conditions existing in the country?

Statement of the Case

This appeal challenges the constitutionality of §1425, subdivision 16, paragraph (d), of the Penal Code of the State of New York.* The statute, on its face prohibits an individual from using words or acts in public to "mutilate, deface, defile, or defy, trample upon, or cast contempt upon" the flag, standard, color, shield or ensign, or any picture

* In connection with a revision of the Penal Law, Section 1425 was transferred in its entirety in September 1967 to the General Business Law as Section 136. The wording remains unchanged.

or representation thereof of the United States of America or the State of New York.

The appellant, a Negro, Sidney Street, is a veteran of World War II, and recipient of the Bronze Star (A-22).* He holds a responsible position with the New York City Transit Authority, is married and has no prior criminal record of any kind (A-21).

Sometime between 6 and 7 p.m. on Monday, June 6, 1966, Street was sitting in his Brooklyn apartment listening to the radio when he heard a news announcement that James Meredith had been shot during his march through Mississippi (A-22).

Street went to a bureau drawer and carefully took out an old 48-star American flag that some years before had been presented to his wife after its use to drape the coffin at the burial of her step-father, a veteran who had been revered by both Street and his wife (A-23).

Street carried the flag, which he and his wife had used on many occasions to celebrate national holidays, to the intersection of Lafayette Avenue and St. James Place, one block from his residence (A-23).

Street first carefully laid a piece of paper on the sidewalk; then, keeping the flag properly folded and holding it in one hand, he set it on fire with a match (A-23). He held the burning flag in his hand as long as he could, then laid it carefully on the piece of paper so that it would not touch the sidewalk (A-23).

A police officer in a passing patrol car saw the smoke from the fire, stopped to investigate, and saw the burning flag (A-23). After talking with various people who had

* All page references are to appellant's Appendix.

gathered around the flag, the officer saw Street, and heard him say "We don't need no damn flag" (A-17). The officer asked Street if he burned the flag, and Street replied, "Yes; that is my flag; I burned it. If they let that happen to Meredith we don't need an American flag" (A-17).

The officer put out the fire, took the unburned portion of the flag, and arrested Street (A-17). Street was later charged with two crimes. One of the charges against Street was for disorderly conduct. The other was a charge that he had engaged in:

> "Malicious mischief in that defendant did wilfully and unlawfully defile, cast contempt upon and burn an American Flag, in violation of 1425(16)(d) of the Penal Law under the following circumstances: On the aforesaid date, place and time, the defendant did wilfully and unlawfully set fire to an American Flag and shout, 'If they did that to Meredith, we don't need an American Flag'."

Street was acquitted of the charge of disorderly conduct, but convicted of violating section 1425(16)(d) of the Penal Law, and it is from this conviction that Street now appeals (A-25).

The arresting officer testified that Street's actions did not cause the sidewalk to become obstructed. There was no obstruction of vehicular traffic (A-20). Those persons who stopped to observe defendant's activities did not become unruly (A-20).

Statute Involved

New York State Penal Law, §1425 (now Section 136, General Business Law):

"16. Any person, who

a. • • •

b. • • •

c. • • •

d. Shall publicly mutilate, deface, defile or defy, trample upon, or cast contempt upon either by words or act, [any such flag] • • •

e. • • •

f. • • •

g. • • •

Shall be deemed guilty of a misdemeanor; • • •"

"The words flag, standard, color, shield or ensign, as used in this subdivision or section, shall include any flag, standard, color, shield or ensign, or any picture or representation, or either thereof, made of any substance, or represented on any substance, and of any size, evidently purporting to be, either of, said flag, standard, color, shield or ensign, of the United States of America, or of the state of New York, or a picture or a representation, of either thereof, upon which shall be shown the colors, the stars, and the stripes, in any number of either thereof, or by which the person seeing the same, without deliberation may believe the same to represent the flag, colors, standard, shield or ensign of the United States of America, or of the state of New York."

Summary of Argument

The present case poses two issues for the Court's consideration. First, may the state constitutionally impose penal sanctions upon an individual charged with destroying or damaging an American flag in an attempt to dramatize his concern with social conditions existing in the country? Second, if such penal sanctions are constitutional, what is the permissible scope of conduct which such a statute may purport to prohibit; and how must such conduct be described?

Since the New York statute at issue herein violates the basic tenets of the "void for vagueness" doctrine articulated by this Court over the years in that it a) purports to sweep within its ambit communication which is clearly protected by the First Amendment, b) fails to afford adequate notice of the scope of its proscription and c) fails to provide adequate standards for enforcement, and is therefore subject to arbitrary and discriminatory application, its invalidity may be determined without reaching the more difficult question of whether a narrowly drawn, precise statute would violate the Constitution.

Even if the statute at issue herein were narrowly and precisely drawn, it could not constitutionally proscribe the defendant's activities. To the extent that communicative activity does not impinge upon substantial governmental interests, it may not be suppressed. Defendant's conduct demonstrably did not impinge upon a substantial governmental interest.

I.

New York's "flag desecration" statute is unconstitutional on its face a) because constitutionally protected conduct may be swept within its ambit, b) because it is so vague and imprecise as to fail to apprise the public of the scope of its proscription and c) because it fails to provide adequate standards for enforcement.

A. *The Statute Is Overbroad Because Constitutionally Protected Conduct May Be Swept Within Its Ambit.*

This Court has consistently refused to uphold a penal statute when conduct protected by the First Amendment may be deemed by local law enforcement officials to fall within the terms of its proscription. See, generally, Amsterdam, *The Void-For-Vagueness Doctrine in the Supreme Court,* 109 U. of Pa. Law Rev. 67 (1960); *Edwards* v. *South Carolina,* 372 U. S. 229 (1963); *Cox* v. *Louisiana,* 379 U. S. 536 (1965); *Stromberg* v. *California,* 283 U. S. 359 (1931); *Thornhill* v. *Alabama,* 310 U. S. 88 (1940); *Winters* v. *New York,* 333 U. S. 507 (1948). See, also, *People* v. *Katz,* 21 N. Y. 2d 132, 286 N. Y. S. 2d 839 (1967). Such overbroad statutes have been held to violate the constitution because they invite local law enforcement officials to suppress constitutionally protected conduct in the mistaken belief that such conduct is prohibited by the statute in question.

New York's flag desecration statute issues just such an invitation. The statute provides that:

> "Any person who . . . shall *publicly* mutilate, deface, defile or *defy*, trample upon, or *cast contempt upon* either by *words* or act [an American flag or any repre-

sentation thereof] . . . shall be guilty of a misdemeanor." (Emphasis added.)

Therefore, under the terms of New York's statute, it would be unlawful to deliver a speech which could be construed as casting contempt upon the American flag or any representation thereof. Since New York City's Administrative Code requires an American flag to be displayed at all "street meetings",[1] New York's statute exposes all such street-corner orators to the scrutiny of local law enforcement officials to determine whether a given speech "casts contempt" upon or "defies" the displayed American flag. Moreover, the statute expressly prohibits verbal criticism of the flag by specifically prohibiting the utterance of words defying or casting contempt upon the American flag in public.

Thus, the following species of conduct would be vulnerable to prosecution under the statute:

a) A public speech in which the speaker argued that the American flag has come to be regarded as a symbol of oppression throughout the world.

b) A public speech in which the speaker renounced his allegiance to the United States and stated that he no longer bore respect for its flag.

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[1] Section 435-8.0(a) of the New York City Administrative Code provides:

"All assemblies, warranted by law, held in any of the streets of the city, where public discussions are held, shall have the American flag . . . conspicuously displayed at all times during the whole of such assembly and every parade or procession must have at or near its head the American flag . . . conspicuously displayed at all times during the formation of such parade or procession."

The constitutionality of that provision is not at issue in this case.

c) A public speech in which the speaker attacked the actions of the United States and remarked that the red stripes of her flag are stained with the blood of innocent people.

d) A public statement in which the speaker observes:

"We don't need no damn flag. If they let that happen to Meredith we don't need an American flag" (A-17).[2]

Additional examples of clearly protected conduct which would appear to violate the statute may be readily imagined. Since the statute purports to prohibit activity which indisputably merits First Amendment protection, it is invalid on its face. *Stromberg* v. *California,* 283 U. S. 359 (1931); *Herndon* v. *Lowry,* 301 U. S. 242 (1937); *Watkins* v. *U. S.,* 354 U. S. 178 (1957); *Winters* v. *New York,* 333 U. S. 507 (1948).

In *Baggett* v. *Bullitt,* 377 U. S. 360 (1964), this Court determined that the State of Washington's loyalty oath provisions were invalid because they were capable of overly broad construction. Mr. Justice White, speaking for the Court, stated:

"The range of activities which are or might be deemed inconsistent with the required promise [loyalty oath] is very wide indeed . . . Even criticism of the design or color scheme of the state flag or unfavorable comparison of it with that of a sister State or foreign country could be deemed disrespectful and therefore violative of the oath." 377 U. S. at 371.

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[2] In fact, it is unclear from the record below whether defendant's words or his actions were the basis for his conviction.

See also, *Cramp* v. *Board of Public Instruction*, 368 U. S. 278 (1961); *Keyishian* v. *Board of Regents*, 385 U. S. 589 (1967). Similarly, criticism of the design or color scheme of the flag or unfavorable comparison of it with that of a foreign country could be deemed a "defiance of" or a "casting of contempt" upon the flag and, therefore, violative of the New York statute.

Since the New York statute, much as the Washington loyalty oath, sweeps within its ambit constitutionally protected as well as allegedly unprotected conduct, it is invalid on its face.

In *Stromberg* v. *California*, 283 U. S. 359 (1931), in reversing a conviction for unlawfully displaying a red flag, Chief Justice Hughes held:

> "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system. A statute which upon its face, and as authoritatively construed, is so vague and indefinite as to permit the punishment of the fair use of the opportunity is repugnant to the guaranty of liberty contained in the Fourteenth Amendment." 283 U. S. at 369.

Nor is the statute saved by the fact that it purports to prohibit conduct which may be arguably the subject of state regulation. Although this Court recognized the propriety of state statutes regulating breach of the peace, it did not hesitate to strike down two versions of such a statute which were sufficiently broad to interfere with

First Amendment conduct. *Cox* v. *Louisiana*, 379 U. S. 536 (1965); *Edward* v. *South Carolina*, 372 U. S. 229 (1963).

Finally, in *Keyishian* v. *Board of Regents*, 385 U. S. 589 (1967), Mr. Justice Brennan, speaking for the Court stated:

> "Thus [the statutes at issue therein] suffer from impermissible overbreadth. They seek to bar employment both for association which legitimately may be proscribed and for association which may not be proscribed consistently with the First Amendment. Where statutes have an overbroad sweep, just as where they are vague, the hazard of loss or substantial impairment of those precious rights may be critical [Citing *Dombrowski* v. *Pfister*, 380 U. S. 479 at p. 486] since those covered by the statute are bound to limit their behavior to that which is unquestionably safe." 385 U. S. at 609.

The overbreadth inherent in the New York statute is illustrated by the position taken by Attorney General Ramsey Clark in his memorandum to the Senate Judiciary Committee concerning the proposed federal flag desecration statute. Attorney General Clark stated:

> "Particular care should be exercised to avoid infringement of free speech. To make it a crime if one 'defies' or 'casts contempt * * * either by word or act' upon the national flag is to risk invalidation. Such language reaches toward conduct which may be protected by first amendment guarantees. The courts have been insistent on guarding against sanctions which reach the protected expression of ideas and also have struck

down on grounds of vagueness provisions which are so broad that they might include protected speech along with conduct that could constitutionally be penalized.

These issues were not involved in *Halter* v. *Nebraska*, 205 U. S. 34 (1907) which upheld the power of a State to enact legislation with respect to the flag, but are suggested by more recent decisions of the courts dealing with other conduct involving manifestations of respect or disrespect for the flag and the system of government in [sic] represents."[*]

Senate Report No. 1287 (90th Cong. First Session) (Committee on the Judiciary).

B. *The Statute Is Vague and Imprecise.*

1. The statute fails to inform the public of the scope of its proscription.

This Court has consistently invalidated governmental regulations which failed to apprise the public of the scope of their proscriptions, e.g., *Lanzetta* v. *New Jersey*, 306 U. S. 451 (1939); *Keyishian* v. *Board of Regents*, 385 U. S. 589 (1967). In *Lanzetta*, the Court explicitly recognized the existence of a constitutionally protected right "to be informed as to what the State commands or forbids." 306 U. S. at p. 453. It is impossible, however, to glean from the wording of New York's flag desecration statute what conduct the statute proscribes. The broad range of conduct to which the statute has been applied in New York illustrates the impossibility of ascribing a definite meaning to

[*] It is interesting to note that Congress evidently heeded the Attorney General's analysis, since the present version of the proposed legislation has abandoned the language to which the Attorney General objected.

its proscriptions.[4] In *People* v. *Place, et al.*, four actors were arrested under the statute for using a flag as a theatrical prop in a play critical of contemporary American values. The charges were ultimately dismissed on motion of the District Attorney of New York County on May 23, 1967. In *People* v. *Radich*, 53 Misc. 2d 717, 279 N. Y. S. 2d 680, aff'd w/o opinion —— Misc. 2d ——, —— N. Y. S. 2d ——, leave to appeal to New York Court of Appeals granted, —— N. Y. 2d —— (1968), a sculptor was convicted of violating the statute for using an American flag as part of his composition. In *United States Flag Foundation, Inc.* v. *Radich*, 53 Misc. 2d 597, 279 N. Y. S. 2d 233 (1967), the New York Supreme Court refused to dismiss an action for civil damages based upon the exhibition of sculpture utilizing the American flag.

Finally, in *People* v. *Duncombe* (Court of Special Sessions for Village of Liberty, New York) the defendant was accused of wearing an article of clothing in the form of an American flag. He was convicted of violating the statute in question and was sentenced to 30 days in jail and a fine of $50. He is currently free on bail pending appeal.[5]

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[4] For examples of desecration of the American flag which might fall under the statute's proscription, see N. Y. Times, March 24, 1967 at 25 col. 1; *id.*, April 15, 1957, at 36 col. 4; *id.*, April 16, 1967 at 1 col. 3; *id.*, April 19, 1967, at 3 col. 4; *id.*, April 20, 1967, at 23 col. 8; *id.*, May 13, 1967 at 17 col. 2; Life Magazine, March 31, 1967 at 18; N. Y. Times Dec. 30, 1966, at 2, col. 2, *id.*, May 21, 1967, section 2 at 33-35.

[5] Duncombe unsuccessfully sought to convene a three judge court to test the statute in question subsequent to his conviction in *Duncombe* v. *New York*, 67 Civ. 1085 (S. D. N. Y. April 12, 1967). Judge Bryan conceded that substantial constitutional questions were raised by the statute, but remitted Duncombe to his state appellate remedy before invoking Federal intervention.

The uncertainty inherent in the New York statute is particularly disturbing because it involves the realm of communication. When rights under the First Amendment have been at issue, this Court has demanded precise delineation of the duties of a citizen. *Saia* v. *New York*, 334 U. S. 588 (1948); *Winters* v. *New York*, 333 U. S. 507 (1948); *Cramp* v. *Board of Public Instruction*, 368 U. S. 278 (1961); *Baggett* v. *Bullitt*, 377 U. S. 360 (1964); *Keyishian* v. *Board of Regents*, 385 U. S. 589 (1967); *Smith* v. *California*, 361 U. S. 147 (1959). The effect of a vague and imprecise penal statute in the First Amendment area is to inhibit protected expression which the public fears *might* fall under the statute's purview. The decision of the trial court in *People* v. *Radich*, 53 Misc. 2d 717, 279 NYS 2d 680, graphically illustrates the danger in permitting imprecise statutes in the area protected by the First Amendment.

The majority opinion states:

> "If he [the defendant] wishes to approach the brink of what is proscribed he necessarily gambles on an adverse finding by the court." 279 N. Y. S. 2d at 685.

However, it is entirely contrary to the holdings of this Court to force a person to "gamble" on whether his form of expression is or is not permitted.

In *Smith* v. *California*, 361 U. S. 147 (1959), Mr. Justice Brennan, speaking for the Court stated:

> "[T]his Court has intimated that stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser." 361 U. S. at 151.

This potential stifling effect upon free expression has resulted in this Court's enunciation of the rigorous requirement of precision in the First Amendment area.

In *NAACP* v. *Button*, 371 U. S. 415 (1963), Mr. Justice Brennan, again speaking for the Court, stated:

> ". . . standards of permissible statutory vagueness are strict in the area of free expression. . . . these freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions. Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." 371 U. S. at 432-433.

See also *Keyishian* v. *Board of Regents, supra* at pp. 603-604; *Speiser* v. *Randall*, 357 U. S. 513 (1958); *Shelton* v. *Tucker*, 364 U. S. 479 (1960). New York's flag desecration statute fails to meet that requirement and is, therefore, invalid.

2. The statute fails to afford adequate standards for enforcement and administration.

A basic policy underlying the "void for vagueness" doctrine is that no governmental regulation, especially in the First Amendment area, may vest an official with overbroad discretion to determine whether or not given conduct falls within its purview. E.g., *Connolly, Commissioner* v. *General Construction Company*, 269 U. S. 385 (1926); *Cox* v. *Louisiana*, 379 U. S. 536 (1965). The principle that adequate guidance must be afforded to government officials charged with a statute's enforcement is designed to protect against arbitrary and unequal enforcement of penal stat-

utes. Such a principle is, of course, doubly important in the sensitive area protected by the First Amendment.

In *Cox* v. *Louisiana*, 379 U. S. 536 (1965), this Court, in declaring Louisiana's vaguely defined breach of the peace statute unconstitutional, stated:

> "[T]he lodging of such broad discretion in a public official allows him to determine which expressions of view will be permitted, and which will not. This thus sanctions a device for the suppression of the communication of ideas and permits the official to act as a censor." 379 U. S. at 557.

In *Thornhill* v. *Alabama*, 310 U. S. 88 (1940), a broad, anti-picketing ordinance was declared unconstitutional because:

> "The existence of such a statute, which readily lends itself to harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure, results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview." 310 U. S. at 97-98.

In *Kunz* v. *New York*, 340 U. S. 290 (1951), *Niemotko* v. *Maryland*, 340 U. S. 268 (1951) and *Staub* v. *City of Baxley*, 355 U. S. 313 (1958), this Court invalidated licensing regulations in the First Amendment area because they failed to provide adequate standards to guide local officials in the exercise of their discretion. This Court has understood that any vague and imprecise penal statute in the First Amendment area becomes, in effect, a licensing provision, permitting only that expression which local officials will tolerate to flourish.

Finally, in *NAACP* v. *Button*, 371 U. S. 415 (1963), the Court stated:

> "The objectionable quality of vagueness and overbreadth does not depend upon the absence of fair notice to a criminally accused . . . but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application." 371 U. S. at 433.

Therefore, New York's flag desecration statute is invalid on its face a) because it purports to outlaw protected as well as allegedly unprotected conduct, b) it fails to afford adequate warning to the public of the scope of its proscription and c) it fails to provide adequate standards for enforcement and, therefore, is susceptible to arbitrary and discriminatory enforcement.

It may be argued that the "void for vagueness" doctrine ought not to be invoked in this case because the public officials of the State of New York may be relied upon to enforce the statute in good faith without ascribing an overbroad construction to its proscriptions. The unhappy application of the statute in the *Radich*, *Duncombe* and *Place* cases, *supra*, certainly casts grave doubt upon any promises of "narrow" construction. In *Baggett* v. *Bullitt*, 377 U. S. 360 (1964), Mr. Justice White, responding to a similar argument, stated:

> "The State labels as wholly fanciful the suggested possible coverage of [the statute] . . . It will not do to say that a prosecutor's sense of fairness and the Constitution would prevent a successful . . . prosecution for some of the activities seemingly embraced within the sweeping statutory definitions. The hazard of being prosecuted . . . nevertheless remains . . . . Well inten-

tioned prosecutors and judicial safeguards do not neutralize the vice of a vague law." 377 U. S. at 373.

Even if no prosecutions were brought at all under New York's flag desecration statute, its very existence and the recognition of the possibility of potential prosecution would serve as a pervasive restraint upon any conduct which might be construed as falling under the statute's purview. Since much of that conduct would be clearly protected by the First Amendment, the mere existence of the statute casts a shadow over the full enjoyment of First Amendment right and it is, therefore, invalid.

Finally, it may be contended that since the defendant herein engaged in conduct which was unquestionably covered by New York's statute,* he may not invoke the void for vagueness doctrine. However, this Court has, on numerous occasions, expressly refused to permit the application of the void for vagueness doctrine to be confined to those persons who were actually confused by a statute's imprecision or whose conduct could not, even under a narrow statute, be constitutionally proscribed.

In *Thornhill* v. *Alabama,* 310 U. S. 88 (1940), Mr. Justice Murphy, speaking for the Court, stated:

"... Proof of an abuse of power in the particular case has never been deemed a requisite for attack upon the constitutionality of a statute purporting to license the dissemination of ideas. ... Rather it derives from an

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* As has been noted above, it is unclear whether the defendant was convicted for his words or for his acts, or for a combination of both. If his words constituted an element of his conviction, or might have constituted an element of his conviction, *Stromberg* v. *California,* 283 U. S. 359 (1931) would require a reversal of his conviction on those grounds alone.

> "appreciation of the character of the evil inherent in a licensing system. The power of the licensor against which John Milton directed his assault by his 'Appeal for the Liberty of Unlicensed Printing' is pernicious not merely by reason of the particular comments but by reason of the threat to censure comments on matters of public concern. It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion.
>
> * * * * *
>
> *An accused, after arrest and conviction under such a statute, does not have to sustain the burden of demonstrating that the State could not constitutionally have written a different and specific statute covering his activities as disclosed by the charge and the evidence introduced, against him.*" 310 U. S. at 98. (Emphasis added.)

In his concurring opinion in *Niemotko* v. *Maryland*, 340 U. S. 268, 273 (1951), Mr. Justice Frankfurter discussed the application of the void for vagueness doctrine to specific instances of allegedly "hard core conduct":

> "The vice to be guarded against is arbitrary action by officials. The fact that in a particular instance an action appears not arbitrary does not save the validity of the authority under which the action was taken." 340 U. S. at p. 285.

See also, *Winters* v. *New York*, 333 U. S. 507 (1948); Note, *Inseparability in Application of Statutes Impairing Civil Liberties*, 61 Harv. L. Rev. 1208 (1948).

Thus, the fact that the defendants' conduct might have been proscribed by New York under a narrow, carefully drawn statute, does not insulate the overbroad and vague statute at issue in this case from the operation of the "void for vagueness" doctrine. Its overbreadth and vagueness render it a threat to the robust exercise of First Amendment freedoms. As such, it must not be permitted to stand.

II.

New York may not constitutionally impose criminal sanctions upon a person accused of publicly destroying or damaging an American flag in an attempt to dramatize his dissatisfaction with social conditions existing within the country.

Free trade in ideas is perhaps the single most important attribute of the American experiment in government. In preserving that precious attribute, this Court has been called upon to decide a series of cases in which traditional forms of idea transmission have been abandoned and new, more dramatic forms have been invoked. See, *e.g.*, *Thornhill* v. *Alabama*, 310 U. S. 88 (1940); *Edwards* v. *South Carolina*, 372 U. S. 229 (1963); *Cox* v. *Louisiana*, 379 U. S. 536 (1965); *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495 (1952); *O'Brien* v. *U. S.*, 36 U. S. L. W. 4469 (1968); *Garner* v. *Louisiana*, 368 U. S. 157, 201 (1961) (Harlan, J., concurring); *Brown* v. *Louisiana*, 383 U. S. 131 (1966); *Adderly* v. *Florida*, 385 U. S. 39 (1966). From these cases has emerged a distinction between "pure" speech, encompassing the more traditional forms of idea transmission such as speech making, writing and pamphleteering, and "symbolic" speech, encompassing newer forms of idea transmission

such as picketing, sit-ins, pantomimes and the destruction of symbolic objects. See, Kalven, *The Concept of the Public Forum* (*Cox* v. *Louisiana*), Supreme Court Review (1965). While "pure" speech continues to enjoy a highly protected status, "symbolic" speech may be subjected to far more rigorous control. *O'Brien, supra.* Essentially, therefore, a basic distinction has emerged between communication effected by verbal transmission of ideas and communication effected by non-verbal, visual methods of idea transmission. Non-verbal, visual methods of idea transmission have been characterized as conduct and not afforded the nature of the constitutional protection afforded to verbal communication. It is respectfully suggested that such a mechanical distinction does not aid this Court in resolving the difficult questions of how best to preserve the free transmission of ideas and, at the same time, maintain the required degree of public order. To distinguish between symbolic and non-symbolic communication is to erect a wholly arbitrary boundary.

All communication is basically symbolic. Language, the medium of traditional communication, is nothing more than a highly developed set of abstract symbols. The *Encyclopedia Britannica* defines language as:

> "An arbitrary system of vocal symbols by means of which human beings, as members of a social group and participants in a culture, interact and communicate." 1965 *ed.*, volume 13, p. 696.

Julius Lippert, in discussing language, stated:

> "A word brings the idea to mind nearly as sharply and clearly as does the object itself and it evokes a response like that produced in the savage by any sense impression." Lippert, *The Evolution of Culture* (1931) 16.

The development of hieroglyphs, the pictographic antecedent of our notion of verbal symbols, illustrates how inextricably intertwined "pure" speech is with the "symbolic" method of communication. Since all communication is basically symbolic, we must determine what form of symbolic traffic in ideas, that is, communication, may be suppressed in order to preserve the required degree of public order. Note, *Freedom of Speech—Desecration of National Symbols as Protected Political Expression*, 66 Mich. L. Rev. 1040 (1968). In attempting to answer that extraordinarily difficult question, it would be appropriate to investigate the following areas:

1. Did the Conduct in Question Have Secondary Effect[1] Apart from the Communication of Ideas?
2. Do the Secondary Effects of the Act of Communication Impinge Upon a Substantial Governmental Interest?
3. Is the Governmental Regulation in Question Neither Broader nor More Stringent than Necessary to Protect the Substantial Governmental Interest?

If the sole effect of a person's conduct is the transmission of ideas, such conduct should be absolutely protected from governmental regulation. However, if a person's conduct, in addition to effecting a transmission of ideas, has some secondary effect, appropriately narrow governmental regulation of the secondary effect's impact upon substantial government interests would, of course, be permissible.

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[1] The secondary effect created by certain conduct designed to transmit ideas may be analogized to the concept of "by-products" associated with the manufacture of many chemical products. It is these "by-products" which are subject to appropriate governmental regulation.

Certain acts of communication such as writings or speech seldom, if ever, possess secondary effects apart from the communication of ideas. They create no "by-products." Therefore, they are almost never subject to governmental regulation. Certain other acts of communication, such as picketing or sitting-in, inexorably create secondary effects apart from their communicative content and are subject to regulation to control the impact of such "by-products" upon substantial governmental interests. *Adderly* v. *Florida*, 385 U. S. 39 (1966). Does the act of flag burning, when intended solely as an act of communication, have a secondary effect apart from the communication of ideas which renders it subject to criminal sanction?[7a]

The secondary effect of the act of communication declared unprotected in *O'Brien* v. *U. S.*, 36 USLW 4469 (1968), was the inevitable non-possession of a draft card. Since the Court determined that the government possessed a substantial interest in requiring young men to possess their draft cards, it concluded that the inevitable by-product of the act of communication could justify governmental regulations aimed at insuring possession. However, no such secondary effect attaches to the communicative act at issue in this case. There is no inevitable frustration of a governmental interest similar to the interest present in *O'Brien* inherent in the desecration of a flag. Certainly, no one could argue that there is any legitimate govern-

[7a] *Halter* v. *Nebraska*, 205 U. S. 34 (1907) is not instructive on this issue. *Halter* dealt solely with the power of a state to legislate concerning commercial exploitation of the flag. It did not deal with the use of the flag in connection with political discussion. In fact, *Halter* was decided some 25 years before this Court held the First Amendment applicable to the states. Cf. *Breard* v. *Alexandria*, 341 U. S. 622 (1951) with *Martin* v. *Struthers*, 319 U. S. 141 (1943).

mental interest in compelling possession of or in enforcing veneration for the flag of the United States. *West Virginia* v. *Barnette*, 319 U. S. 624 (1943). Therefore, this case is clearly distinguishable from *O'Brien*.

Although the "by-product" of the communicative act in *O'Brien* is not present in this case, we must determine whether any other "by-product" justifying regulation is present.

One such possible "by-product" is that the destruction of a flag is an affront to the symbolic sovereignty of the State. In his decision in *Minersville School District* v. *Gobitis*, 310 U. S. 586 (1940), Mr. Justice Frankfurter embraced the "symbolic sovereignty" concept when he stated:

> We live by symbols. The flag is the symbol of our national unity transcending all internal differences, however large, within the framework of the Constitution. 310 U. S. at 596.

Justice Frankfurter went on to hold in *Gobitis* that the symbolic nature of the flag justified a regulation requiring compulsory flag salutes, even if such salute constituted a violation of a person's religious beliefs. However, the notion that the symbolic nature of the flag could form the pretext for a suppression of otherwise constitutionally protected conduct was abandoned three years later in *West Virginia* v. *Barnette*, 319 U. S. 624 (1943), when this Court, reversing *Gobitis*, held that compulsory flag salutes violated the First Amendment to the Constitution.

Mr. Justice Jackson, writing for this Court in *Barnette* explicitly rejected the argument that the symbolic nature of the flag conferred upon it some sort of talismanic im-

munity from the reach of the First Amendment. Holding that compulsory flag veneration was unconstitutional, he wrote:

> "There is no mysticism in the American concept of the State or of the nature or origin of its authority . . . . The case is made difficult not because the principles of its decision are obscure but because the flag involved is our own. Nevertheless, we apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization.
>
> • • • • • •
>
> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us." 319 U. S. at 641-642.

Thus the fact that flag destruction is in some metaphysical way an affront to our symbolic sovereignty cannot and ought not to form a basis for punishment. For if we concede that there are certain political symbols which are above desecration, we open the door to drastic suppression of our right to criticize the state. There is no logical differentiation between burning the flag and burning an effigy of the President. Our flag is really the effigy of a nation. As such, it is not immune from symbolic criticism. *West Virginia* v. *Barnette, supra,* at 632.

The second possible secondary effect of flag desecration is the creation of public disorder.[8] Certainly actions which will inevitably cause an *imminent* danger of a breach of the peace may be regulated, even though they are communicative acts. *Chaplinsky* v. *U. S.*, 315 U. S. 568 (1942).[9] However, the nexus between a communicative act and the imminent danger of a breach of the peace must be very close indeed to justify regulation. Compare *Feiner* v. *N. Y.*, 340 U. S. 315 (1951) with *Terminiello* v. *Chicago*, 337 U. S. 1 (1949). The mere fact that a given communicative act may displease onlookers and even rouse them to anger does not justify the prohibition of such an act. *Terminiello* v. *Chicago*, 337 U. S. 1 (1949); *Edwards* v. *South Carolina*, 372 U. S. 229 (1963); *Cox* v. *Louisiana*, 379 U. S. 536 (1965).

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[8] It is this secondary effect which formed the basis of Judge Fuld's decision below.

[9] The statute at issue in *Chaplinsky* rendered illegal the use of insulting words in public likely to cause a breach of the peace. Mr. Justice Murphy, in sustaining the conviction, stated that when applied to "fighting words" the statute was constitutional. The words involved in *Chaplinsky* were specific insults directed against a specific individual. As such, they closely resembled private libel. There was no intent in *Chaplinsky* on the part of the defendant to offer public criticism of the issues of the day. Thus, it is not surprising that the defendant's conduct was held to be unprotected. If, however, the words in question had not been directed at a specific individual and had been intended to offer public comment upon the problems of the day, it is not at all certain that the same result would have followed. *Terminiello* v. *Chicago*, 337 U. S. 1 (1949). In fact, in *Garrison* v. *Louisiana*, 379 U. S. 64 (1964) and *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964) this Court drastically narrowed the constitutional scope of criminal libel laws when comment upon the issues of the day is involved. Thus, the fact that the defendant's actions in this case were truly "public" in character, as opposed to the "private" nature of the *Chaplinsky* conduct, and were intended to offer comment upon the issues of the day, render *Chaplinsky* inapplicable as a precedent for suppression. If anything, this case is closer to the principles enunciated in *Times* v. *Sullivan* and *Garrison* v. *Louisiana*, *supra*.

To permit the fear of hostile reaction to found the basis for suppression, in advance, of the transmission of certain ideas strikes at the very heart of the First Amendment. We cannot permit the emergence of a doctrine of "political obscenity" which renders certain communication unprotected merely because it may have an adverse emotional impact upon a hostile audience. *Cox* v. *Louisiana, supra; Edwards* v. *South Carolina, supra.*

Would an ordinance prohibiting the public discussion of interracial marriage in a small Southern village be constitutional merely because village authorities feared that it might result in a breach of the peace? Certainly not. The First Amendment could not long survive the existence of a "heckler's veto."

A crucial indicia of a truly free society is the manner in which it responds to attempts to render certain idea transmission illegal, not because such conduct is in itself harmful, but because it *may* lead to other conduct which would be harmful. In the present case we are faced with an attempt to render flag burning illegal because it may lead to something worse, that is, a breach of the peace. In the delicate area of free expression, this Court has uniformly required a showing that communicative conduct must be almost inevitably likely to lead to the feared greater evil before such communication may be suppressed.

The basic rationale of the "clear and present danger" doctrine enunciated by this Court is that communicative conduct may not be suppressed merely because it *might* lead to a substantive evil. See, *e.g., Thomas* v. *Collins,* 323 U. S. 516, 530 (1945); *Schenck* v. *United States,* 249 U. S. 47 (1919). More than a mere possibility is required.

In *Garrison* v. *Louisiana*, 379 U. S. 64 (1964) this Court reversed a criminal libel conviction under a statute which permitted punishment of malicious statements, even if true. The Court held that Louisiana's rejection of a clear and present danger test as a guide to the application of its criminal libel statute to criticism of public officials rendered the statute unconstitutional. New York has likewise rejected a clear and present danger test in applying its flag desecration statute by outlawing all flag desecration, even when no danger of a breach of the peace is occasioned. The New York statute at issue herein is premised upon an abstract determination that the communicative conduct in question may be absolutely suppressed because it *might* lead to a breach of the public peace.[10] Such a determination is a perversion of the ordinary requirement that communicative activity may be suppressed only when a substantive evil is actually imminent. That such a substantive evil was not imminent in the instant case is clearly demonstrated by the acquittal of the defendant of the charge of disorderly conduct (A-25). In effect, the trial court found that no imminent danger of a breach of the peace existed.[11] Since there was no danger of a breach of the peace surrounding the defendants' communicative act, it should not be subject to governmental suppression. The abstract determination,

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[10] If the statute were phrased or construed in terms of prohibiting flag burning only when it would cause an imminent danger of a breach of the peace, of course, this objection would disappear. However, the construction placed upon the statute by New York's highest court renders all flag burning illegal, whether or not it would cause an imminent danger of a breach of the peace.

[11] Section 722 of the Penal Law, in effect at the time of appellant's conviction, required a finding of conduct tending to induce an imminent breach of the peace. Section 722 has been superseded by Section 240.20 of the Penal Law.

in advance, that all flag desecration is illegal, without regard to the actual imminence of public disorder, comes dangerously close to a "prior restraint" on communication. *Near* v. *Minnesota*, 283 U. S. 697 (1931). Such suppression is a prime example of permitting a governmental regulation to become so broad that it ceases merely protecting the governmental interest and unduly impinges upon the communicative act itself.

Thus, since the communicative act involved in this case did not in fact create "by-products" that endangered any substantial governmental interest, it cannot be suppressed.

It is no coincidence that this Court has been confronted during the past decade with a number of cases in which traditional forms of idea transmission have been eschewed in favor of new, more dramatic forms of communication. The rise of these new forms of communication is attributable to a recognition by many persons that the traditional methods of idea transmission are not sufficient in today's world to insure the maintenance of a free market place of ideas in which the truth and reason can ultimately prevail. See, *e.g.*, *Abrams* v. *United States*, 250 U. S. 616, 630 (1919).

Two concurrent factors, both ultimately traceable to the revolution in communications technology which has occurred since the end of World War II, have impelled the rapid rise of the new forms of communication. First, the extraordinary power over the dissemination of ideas which is exerted by the mass media; and second, the gradual ascendency of visual (and therefore non-verbal) forms of communication.

A. *The Power of Mass Media*

Traditionally, we have accepted the doctrine of John Stuart Mill that ideas must be permitted to compete freely in the marketplace in order for truth and reason to prevail. See, *On Liberty, Essential Works of John Stuart Mill* (1965) 295; *First Inaugural Address of Thomas Jefferson,* in Koh and Peden, *The Life and Selected Writings of Jefferson* (1944) 321; *Abrams* v. *United States, supra.*

In recent days, however, there are those who have contended that the intellectual free market of Mill is as moribund as the economic free market of Adam Smith. Each was killed, they assert, by accretions of competitive power which destroyed the ability of smaller units to compete effectively. Herbert Marcuse, a leading critic of the marketplace of ideas concept, has written:

> "The underlying assumption is that the established society is free, and that any improvement, even a change in the social structure and social values would come about in the normal course of events, prepared, defined, and tested in free and equal discussion, in the open marketplace of ideas . . . ."
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> • • • • •
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> "With the concentration of economic and political power and the integration of opposites in a society which uses technology as an instrument of domination, effective dissent is blocked where it could freely emerge: in the formation of opinion, in information and communication, in speech and assembly." Marcuse, *Repressive Tolerance in A Critique of Pure Tolerance* (1965) 92-97.

Marcuse's reasoning is seductive and his criticisms cannot be lightly dismissed. According to Marcuse, the dissenter who cannot afford access to television time or space in a mass periodical is simply not able to gain the attention necessary to communicate effectively with masses of people and is therefore shut out from effective participation in the marketplace of ideas. In fact, we have witnessed a distressing trend toward oligopolistic control of mass organs of communication. See, generally, Rucker, *The First Freedom*, (1968); Liebling, *The Press* (1961). Few persons can hope to surmount the economic barriers which bar many persons from access to the mass media. Barron, *Access to the Press—A New First Amendment Right*, 80 Harv. L. Rev. 1641 (1967).

However, a people steeped in the traditions of democracy, a people dedicated to the principle that truth and reason will prevail so long as ideas may be freely transmitted, have intuitively responded to the danger posed by the problem of inadequate access to the mass media by evolving new, more dramatic forms of communication, which not only possess a greater impact upon the persons in the immediate vicinity, but also, and even more importantly, unlock the key to the mass media as well.[12] For the very occurrence of the more dramatic form of communication becomes a newsworthy item and, therefore, reported by the mass media. Thus, these new forms of communi-

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[12] Jerome Barron has written:

"The failures of existing media are revealed by the development of new media to convey unorthodox, unpopular and new ideas. Sit-ins and demonstrations testify to the inadequacy of old media as instruments to afford full and effective hearing for all points of view. Demonstrations it has been well said are 'the free press of the movement to win justice for Negroes.'" *Barron, supra,* at 1647.

cation have been of crucial significance in preserving and strengthening the free market of ideas. The special significance of unconventional forms of protest, such as flag burning, is that they provide a method of intellectual "pump-priming" which rejuvenates, much as Keynesian economics rejuvenated the economic free market, the intellectual free market in ideas. Unless such intellectual "pump-priming" is protected and encouraged, the contentions of critics such as Professor Marcuse that the free market in ideas is nothing more than a romantic myth will appear to contain a semblance of truth.

B. *The Ascendancy of Visual Communication*

The invention of the printing press ushered in a revolution in communications which dominated the transmission of ideas for centuries. The printed word became the primary vessel for informing and influencing the Western world. However, the primacy of the printed word has been challenged in the second half of the twentieth century by the dramatic rise of visual communication. Commentators such as Marshall McLuhan[13] have chronicled both the rise of visual communication to a position of ascendancy and its concurrent impact upon the transmission of ideas. McLuhan's axiom that "the medium is the message" is a shorthand statement of the principle that the form in which a communication is couched has as great an impact upon its efficacy as does the communication's content. As the nation becomes more and more conditioned to receiving its communication by visual rather than written modes, the new methods of communication which have confronted this

[13] McLuhan, *Understanding Media* (1964); Lacy, *Freedom and Communication* (1961).

Court and which are essentially visual in nature take on greater importance. For if, in fact, "the medium is the message," or at least an important ingredient of the message, this Court has responsibility to insure that new, visual forms of communication receive the protection to which they are entitled.

This Court has not hesitated to accord protection to newly evolved forms of visual communication. Mr. Justice Clark, writing for the Court in *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495 (1952), held that motion pictures were entitled to First Amendment protection. Justice Clark stated:

> ". . . the present case is the first to present squarely to us the question whether motion pictures are within the ambit of protection which the First Amendment . . . secures to any form of 'speech' or 'the press.'
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> It cannot be doubted that motion pictures are a significant medium for the communication of ideas.
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> • • • • •
>
> . . . we conclude that expression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendment." 343 U. S. at 501-02.

This Court should be alert to the communications revolution now occurring on its doorstep and accord protection to the newly evolving, non-violent forms of visual idea transmission.

CONCLUSION

The statute in question should be declared unconstitutional and the defendant's conviction reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 5

SIDNEY STREET,

Appellant,

v.

THE PEOPLE OF THE STATE OF NEW YORK,

Appellee.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK

BRIEF OF AMICUS CURIAE UNITED STATES FLAG FOUNDATION, INC.

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Interest of Amicus Curiae United States Flag Foundation, Inc.

Appellant Street attacks the constitutionality of New York General Business Law § 136(d) [formerly New York Penal Law § 1425, subd. 16(d)], deeming guilty of a misdemeanor "[a]ny person, who * * * [s]hall publicly mutilate, deface, defile, or defy, trample upon, or cast contempt upon" the flag of the United States. The United States Flag Foundation is vitally interested in upholding this law and seeing that its purpose is achieved.

The United States Flag Foundation, Inc. is a tax-exempt, non-profit, patriotic and educational corporation organized under the laws of New York to promote the display of and respect for the flag of the United States and to encourage the study of the flag and American history. The present activities of the Foundation include: sponsoring and urging passage of legislation prohibiting public dishonor of the flag; advising individuals and organizations on the proper use and display of the flag; preparing and distributing literature and providing lectures on the history of the flag; lodging complaints against disrespectful or contemptuous use or representation of the flag.

Since the statute which appellant attacks here is intended to and does prohibit dishonor and disrespect to the flag, the United States Flag Foundation has an urgent interest in supporting the statute's validity.

Summary of Argument

New York's anti-flag desecration statute is constitutional on its face and as applied to the appellant here at least insofar as it provides that "Any person who * * * [s]hall publicly mutilate, deface, defile or defy, trample upon, or cast contempt upon [the United States flag] * * * by * * * act * * * [s]hall be deemed guilty of a misdemeanor." For such acts of public desecration of the flag are not "speech" within the meaning of the First Amendment but constitute conduct which may properly be regulated by the State.

Granting the New York Court of Appeals' premise that public acts of flag desecration are a form of "symbolic speech", the statute in question is nonetheless constitutional. For the people, represented by their State govern-

ment, have a sufficiently important interest in protecting the national flag from public disgrace to justify regulation of these acts, even though whatever communicative element may be inherent in such conduct is incidentally forbidden.

ARGUMENT

New York General Business Law § 136(d), insofar as it prohibits acts of public desecration of the United States flag, is constitutional since it does not violate the free speech protections of the First and Fourteenth Amendments either on its face or as applied to appellant here.

A. *The Public Burning of the United States Flag and Other Conduct Which Publicly Disgraces the Flag Is Not "Speech" Within the Meaning of the First Amendment.*

In *United States* v. *O'Brien*, 391 U.S. 367, 376 (1968), this Court recently said: "We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." With respect to the United States flag, the variety of conduct so labeled could be limitless indeed: burning the flag, spitting on it, forming it into vulgar and degrading shapes, urinating or defecating upon it, etc. What idea does such bizarre conduct convey? The actor is "mad at something"? But what? Our Government's Vietnam policy? The assassination of a President, a Senator, a prominent civil rights leader?

Conduct which desecrates the flag, in our view, conveys no meaningful idea. Invariably, to be meaningful the conduct must be explained verbally, just as O'Brien explained

his burning of his draft card to the FBI men and to the jury (391 U.S. at 369-370), and just as Sidney Street, the appellant here, explained his burning of an American flag to the crowd and to the arresting officer (17a, 24a). But the prohibited conduct itself cannot rationally be held to be "speech". Any argument to the contrary

> "has as its major unarticulated premise the assumption that people who want to propagandize protests or views have a constitutional right to do so whenever and *however* and wherever they please. That concept of constitutional law was vigorously and forthrightly rejected in * * * *Cox* v. *Louisiana*, [379 U.S. 536 (1965)] * * *. We reject it again."

Adderley v. *Florida*, 385 U.S. 39, 47-48 (1966) (emphasis added).

New York General Business Law § 136(d) is applicable to all persons within New York and is narrowly drawn to prohibit certain types of clearly-defined conduct. Insofar as it does so, it does not violate the free speech protections of the First and Fourteenth Amendments and is constitutional on its face and as applied to appellant here.

B. *There Is a Sufficiently Important Governmental Interest in Protecting the United States Flag from Desecration to Justify Incidental Limitation on Whatever Elements of "Speech" May Be Inherent in the Acts of Desecration Prohibited by the Statute.*

In this case, the New York Court of Appeals assumed, as this Court assumed in *O'Brien*, that the act of burning a United States flag (or a draft card) contained a "communicative element * * * sufficient to bring into play the First Amendment", but that "it does not necessarily follow that

the destruction of a registration certificate [or an American flag] is constitutionally protected activity." Compare *United States* v. *O'Brien, supra,* 391 U.S. at 376, with *People* v. *Street,* 20 N.Y. 2d 231, 234 (1967). Rather,

> "This Court has held that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedom is no greater than is essential to the furtherance of that interest."

United States v. *O'Brien, supra,* 391 U.S. at 376-377.

The New York Court of Appeals held that the substantial State interest which justifies the statute here in question is the State's interest in preventing breaches of the peace, which public indignities to our flag are likely to provoke. *People* v. *Street, supra,* 20 N.Y. 2d at 236-237. True, this may be *an* interest of the State which justifies a prohibition on conduct publicly desecrating the flag, and a consideration which has particular importance in the context of this case. But we submit that the truly paramount State interest which vindicates New York's anti-flag dese-

cration statute is the urgent concern of the people of New York for the protection from dishonor of the symbol of our nation—its liberty and its ideals, the standard which represents our country's past, its present, its hopeful future.* As the first Mr. Justice HARLAN said in *Halter* v. *Nebraska*, 205 U.S. 34, 41 (1907):

> "For [the United States] flag every true American has not simply an appreciation but a deep affection. No American, nor any foreign born person who enjoys the privileges of American citizenship, ever looks upon it without taking pride in the fact that he lives under this free Government."

This is, we submit, the most important and substantial governmental interest furthered by the salutary statute now under attack, for a government *is* the people it governs. Nor can there be any doubt that this governmental interest is totally unrelated to the suppression of free expression; there are any number of constitutionally-protected ways for a person to make known his dissent or protest to any aspect of our government or society. The restriction on speech—if any—imposed by the New York statute is the minimum necessary to the furtherance of the people's interest. *Cf. United States* v. *O'Brien, supra*, 391 U.S. at 377.

---

* The intent of the New York State Legislature in passing what is now General Business Law § 136(d) was to protect the American flag from desecration and to insure its respectful use, and not to prevent breaches of the peace. *People* v. *Picking*, 23 N.Y.S. 2d 148, 149 (Magis. Ct. N. Y. City 1940) (not officially reported), *aff'd mem.* 263 App. Div. 366 (1st Dep't 1942), *aff'd mem.* 288 N.Y. 644 (1942), *cert. denied* 317 U.S. 632 (1942), *reh. denied* 317 U.S. 708 (1942); ch. 54, [1917] Laws of New York 106 (caption); 1943 Report of N. Y. Att'y Gen. 90-91; 1941 Report of N. Y. Att'y Gen. 465; 51 N. Y. State Dep't Reports 240 (1934).

Appellant relies on *West Virginia Board of Education* v. *Barnette*, 319 U.S. 624 (1943), in an attempt to distinguish the present case from the principles enunciated in *O'Brien*. (Brief, pp. 20-25.) But his reliance on *Barnette* is misplaced. As appellant himself recognizes (Brief, pp. 23-24, 25), *Barnette* is concerned with governmentally-enforced veneration of the United States flag, and turns on the proposition that

> "no official • • • can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." 319 U.S. at 642.

But here, appellant is not being forced to love his country or his country's flag or to pledge allegiance to either. No compulsion is involved. This statute does not force respect, any more than it prohibits dissent. Unlike the statute struck down in *Barnette*, it does not compel salutes to the flag or any other action. Appellant is not being made to *do* anything; he is merely prohibited from doing certain clearly, reasonably and narrowly defined acts which constitute desecration of our national flag. Surely the Constitution is not dedicated to the proposition that all men can unqualifiedly do as they please.

CONCLUSION

New York General Business Law § 136(d) is constitutional on its face and as applied to appellant here insofar as it makes unlawful conduct which dishonors or desecrates the flag of the United States of America.

Respectfully submitted,

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Dated: September 13, 1968

SUPREME COURT, U. S.

Argued by
HARRY BRODBAR

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IN THE

Supreme Court of the United States

October Term, 1968

No. 5

SIDNEY STREET,

Appellant,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF
THE STATE OF NEW YORK

BRIEF FOR APPELLEES

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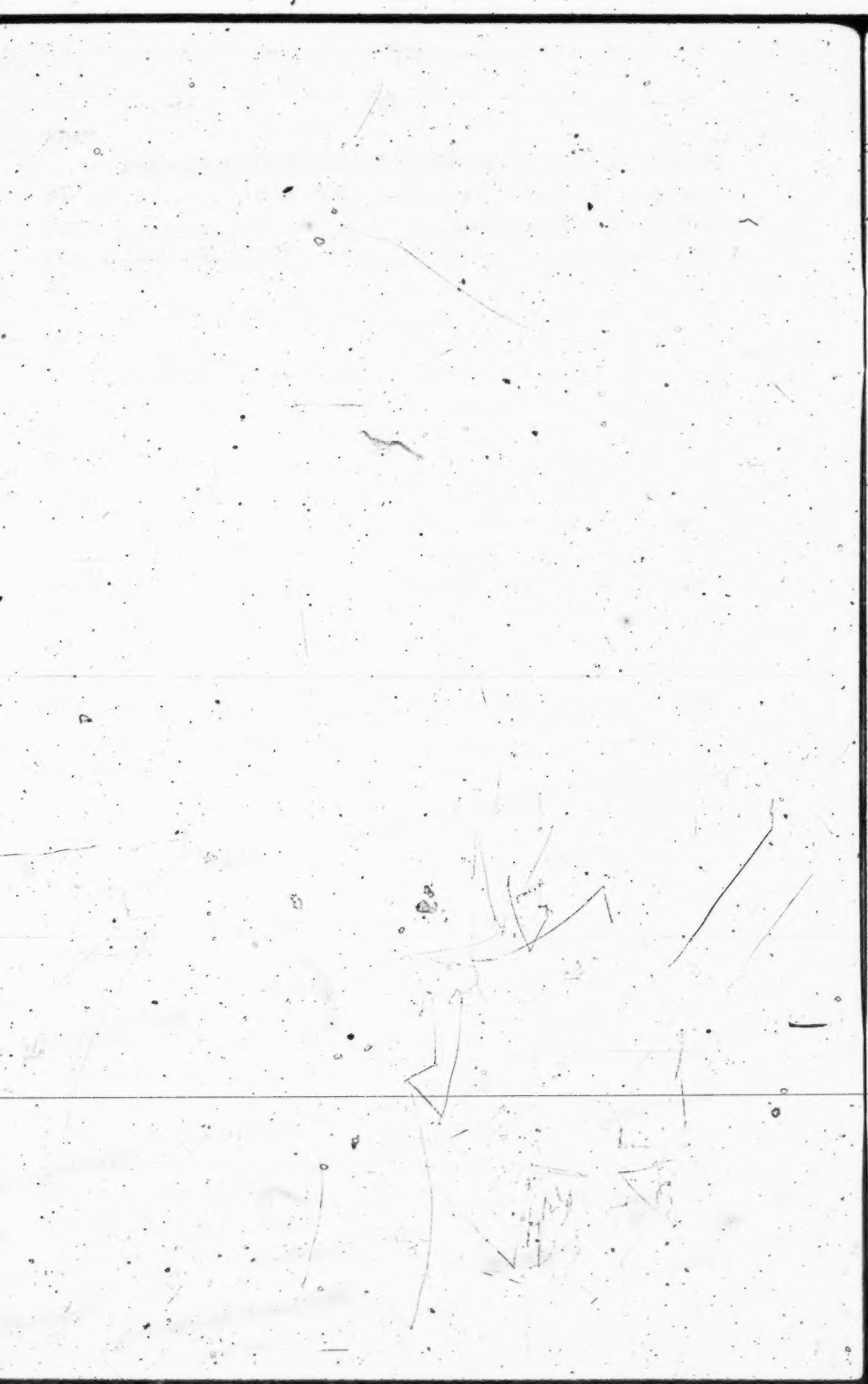

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 5

SIDNEY STREET,

Appellant,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR APPELLEES

Statement

This is a direct appeal by the appellant from the order of the Court of Appeals of the State of New York, entered on July 7, 1967, affirming the order of the Appellate Term of the Supreme Court, Second Department, dated December 23, 1966, which affirmed the judgment of the Criminal Court of the City of New York, County of Kings, of August 9, 1966, convicting him of Malicious Mischief, sec. 1425, subd. 16, para. d, of the Penal Law of the State of New York, said statute making it a misdemeanor to "publicly mutilate, deface, defile, or defy, . . . or cast contempt [upon], either by words or act . . . the flag of the United States of America." The sentence was suspended.

Appellant appealed to this Court on August 30, 1967, and probable jurisdiction was noted on June 17, 1968. 36 U.S.L. WEEK 3483.

The jurisdiction of this Court rests upon Title 28 U.S.C. Section 1257 (2).

Opinion Below

The opinion of the Court of Appeals of the State of New York was handed down on July 7, 1967, and is reported in 20 NY 2d 231, 229 N.E. 2d 187. See appellant's Appendix, pp. 3a-10a, for text of opinion. No written opinion or memorandum was handed down by the Appellate Term of the Supreme Court of the State of New York, Second Department, or the Criminal Court of the City of New York, County of Kings.

Constitutional and Statutory Provisions Involved

Section 1425 of the Penal Law of the State of New York provides in its pertinent parts as follows:[1]

"16. Any person, who

a. . . .

b. . . .

c. . . .

---

[1] By L. 1965, c. 1031, Sec. 52, eff. Sep. 1, 1967, this statute has been superseded by Section 136 of the General Business Law of the State of New York in which the identical language is employed, except for a portion thereof not relevant herein. Since appellant has referred to the prior section in his brief, appellees will continue to do likewise with the understanding that the references are applicable to the more recent enactment.

See Appendix A-1, A-2 *infra* for copy of letter of Hon. Richard G. Denzer, Executive Director, NEW YORK STATE TEMPORARY COMMISSION ON REVISION OF THE PENAL LAW AND CRIMINAL CODE, August 15, 1968, referring to the rationale for statute's transfer to the General Business Law.

d. *Shall publicly mutilate, deface, defile or defy, trample upon, or cast contempt upon either by words or act . . .*

e. . . .

f. [proscribing still another act] . . . *the flag of the United States of America . . .*

g. . . .

Shall be deemed guilty of a misdemeanor; . . ."

"The words flag, standard, color, shield or ensign, as used in this subdivision or section, shall include any flag, standard, color, shield or ensign, or any picture or representation, or either thereof, made of any substance, or represented on any substance, and of any size, evidently purporting to be, either of, said flag, standard, color, shield or ensign, of the United States of America, or of the state of New York, or a picture or a representation, of either thereof, upon which shall be shown the colors, the stars, and the stripes, *in any number of either thereof,* or by which the person seeing the same, without deliberation may believe the same to represent the flag, colors, standard, shield or ensign of the United States of America, or of the state of New York.

"This subdivision shall not apply to any act expressly permitted by the statutes of the United States of America . . ." (Emphasis supplied.)

The first Amendment to the United States Constitution provides:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; *or abridging the freedom of speech,* or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." (Emphasis supplied.)

The Fourteenth Amendment, Section 1, to the United States Constitution provides:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article 1, Section 8, of the Constitution of the State of New York reads as follows:

"*Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press.* In all criminal prosecutions or indictments for libels, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact." (Emphasis supplied.)

Questions Presented

1. The appellant inquires whether New York's flag-desecration statute violates the basic tenets of the "void for vagueness" doctrine in that it (a) purports to sweep within its ambit conduct[2] which is clearly protected by the First

[2] Although appellant states that the record below is unclear whether his words or actions were the basis for his conviction (Brief for Appellant, p. 9, note 2; p. 18, note 6), the State shall endeavor to clearly demonstrate that the appellant was convicted for the deliberate physical act of desecrating the flag of the United States of America, in public, and that any oral statement attributed to him at the time he committed the physical act was not the ground for his conviction, but, rather served solely as support in resolving the presence of *intent* to desecrate the flag at the time it was set on fire.

and Fourteenth Amendments to the United States Constitution; (b) fails to afford adequate notice of the scope of its proscription; and (c) fails to provide adequate standards for its enforcement.

2. The appellant also poses the question: May the State of New York constitutionally impose penal sanctions upon one who is charged with publicly and deliberately desecrating an American flag as a means of dramatizing his dissatisfaction with social conditions existing within our Country?

Statement of the Case

The Trial

A. The People's Case

At the commencement of the trial, the appellant moved to dismiss the complaint upon the ground that the First Amendment to the United States Constitution, with regard to freedom of speech, protected his right to protest "in many forms, whether it be by *burning a flag*, demonstration or picketing," and that the appellant's act of burning the flag was a "form of demonstration and protest" (13a, emphasis supplied).[3] The appellant's motion to dismiss the complaint was also predicated on the premise that the applicable statute was in violation of the Supremacy Clause of the United States Constitution. This argument, too, was not acceptable to the trial court, and that motion was likewise denied (14a). A stipulation was entered into that the charges against the appellant, Malicious Mischief, and Disorderly Conduct, which had been set forth in two separate complaints, would be tried together, and that the facts adduced in one would be applied to the other "wherever necessary, and [that] there [would] be separate findings on the

[3] Numbers in parentheses refer to pages of appellant's Appendix.

facts and the law and separate judgments [would] be rendered'' (14a-15a).

Patrolman James Copeland, a New York City Police Officer, testified substantially as follows:

On June 6, 1966, at or about 7:00 P.M., he had occasion to be present at Lafayette Avenue and St. James Place, in the County of Kings, City and State of New York, where he saw a crowd collected at the corner (15a). There was a fire burning, and the officer got out of his car, and walked over toward the fire around which the crowd was standing (15a-16a). According to the officer, a large folded flag, which he recognized to be an American flag, was burning. After inquiring of the people in the crowd as to the identification of the person responsible for this, the officer walked over to the northwest side of Lafayette Avenue, on the other side of the street, where he saw the appellant standing and talking loudly (16a-17a). The appellant was motioning with his hands, and saying, ''We don't need no damn flag.'' The officer asked him if he burned the flag, to which the appellant answered, ''Yes; that is my flag; I burned it'', and, ''If they let that happen to Meredith[4] we don't need an American flag'' (17a). The officer then extinguished the fire, placed the appellant under arrest, and took him, and the remaining portion of the flag, to the precinct (17a). According to the officer, about 30 people, other than the appellant, were present at the scene, when the officer arrived, and by the time the arrest was made, about 35 to 40 people were in the group (17a). He had been 10 or 15 feet from the appellant when he began to understand what the latter was talking about (18a).

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[4]Referring to the unfortunate incident which occurred during a civil rights march when the noted civil rights Leader, James H. Meredith, was wounded by a snipers bullet near Hernando, Mississippi, on June 6,1966.

On cross examination, the officer testified that at the time of the incident he had been in a patrol car with another officer, who was not then present in court. That officer had been present during the entire incident, and the witness stated that if his partner were then in court he would substantiate the witness' testimony (18a). Prior to approaching the appellant, the officer parked his vehicle in front of the burning flag, on the northeast side of Lafayette Avenue and St. James Place. The appellant was then standing on the northwest corner (18a). There were people standing on all four corners, with about 30 persons on the northeast corner where the burning flag was, and 5 or 10 persons on the northwest corner where the appellant was then located (19a). When the witness left his patrol car, he began to stamp out the burning flag. The officer left the flag on the ground and went over to the appellant across the street to ask him if he burned it. Portions of the flag were picked up by the officer after the appellant was brought over to the patrol car (19a-20a). The time was then about 7:00 P.M. There was a subway entrance at the southeast corner, as well as a housing development and a church nearby (20a). Traffic was moving on Lafayette Avenue. No crowd overflowed to obstruct traffic, and not all of the persons who stopped to see what had happened continued to move on (20a). The wide sidewalk was not obstructed and persons were able to pass by. The crowd was not unruly (20a). According to the police officer, who claimed to be acquainted with the correct manner of folding an American flag, it was then folded with the stars and stripes facing upward. He did not know if the flag had been folded in the proper way because "it was burned quite badly" (21a). The flag had not been "on a newspaper or anything" (21a).

B. The Defense.

The appellant testified in his own behalf substantially as follows:

He was then employed as a bus driver by the New York City Transit Authority for 20 years, and was married. He had never appeared in a court before (21a). He had served honorably in the military service for a period of 5 years, in the Quartermaster Corps. He was a recipient of the Bronze Star (22a). On the day of the occurrence he had been in his apartment when he heard a news report that James Meredith had been shot. When he heard that he said, "They didn't protect him," and went to his dresser drawer and took out the American flag (22a). This 48-star flag had been given to his wife's mother and had draped the coffin at the funeral of his wife's stepfather. The flag was faded, about 20 years old, and had been displayed by him on National holidays (23a). He had a second flag with 50 stars. After hearing the broadcasted report about Meredith, he took the flag to St. James Place and Lafayette Avenue. There he placed a piece of newspaper on the ground, held the flag in his left hand, "struck a match and made a flame and I stood there and I held it as long as I could. When it began to burn my hand I dropped the flag" (23a). The patrol car then stopped, and the policeman asked him if he had set fire to the flag (23a-24a). He admitted that he had, and told the officer, "If they do what they had [sic] to Meredith we don't need this flag" (24a). No one else spoke to him, and he noticed no unusual crowd. The flag, which was still burning when the officer came, was on the curb. The appellant did not speak to anyone else but the police officer at the time (24a).

On cross examination, the appellant testified that the particular flag involved had been in the dresser drawer for at

least one year, and that he had displayed a new flag the previous Memorial Day (18). The flag in question had not been displayed after the new one was purchased. When asked when he had decided to burn the old flag, the appellant testified that the idea of doing so had come when the new one was purchased. However, he did burn it after he heard that James Meredith had been shot, although "not immediately." He had planned to burn the flag long before he "heard about Meredith" (25a).

At the conclusion of the trial, the appellant was acquitted of the charge of Disorderly Conduct, and found guilty of Malicious Mischief, in that he violated sec. 1425, subd. 16, para. d, of the Penal Law of the State of New York, *supra*, (25a), for which he received a suspended sentence.[5]

Summary of Argument

The statute in question, section 1425, subdivision 16, paragraph d, of the Penal Law of the State of New York, *supra*, designed to secure the peace and well-being of the inhabitants of the State, and to preserve the dignity of the Flag of the United States of America, the cherished "symbol that represents our heritage and our hopes,"[6] is not unconstitutional on its face and as applied because of any vagueness or overbroadness. Nor is it an unreasonable restraint of free expression of thoughts or ideas, notwith-

[5] Although the sentence minutes have not been made part of the appellant's Appendix, the Court is respectfully referred to the opinion of Chief Judge Stanley H. Fuld wherein reference is made to the trial court's determination. (Appellant's Appendix 10a.)

[6] Mr. Justice Frankfurter in *West Virginia Board of Education* v. *Barnette*, 319 U.S. 624, 662, 63 S. Ct. 1178, 1196 (1943) (dissenting opinion).

standing the fact that the statute forbids the use of "words", or deliberate "nonverbal" acts of desecrating the flag for which latter action he was arrested, tried and convicted, and by which performance he hoped to communicate his dissatisfaction with undesirable social conditions in our land in a more dramatic manner than afforded by other more traditional media of expression.

There is a serious necessity for the type of legislation now in issue, and this becomes more manifest in this critical period of our Nation's history, which counsel for appellees chooses to characterize as an "era of arrogance,"[7] because of the many forms of rebellious behavior which have come to bear upon our society and which are entirely dissociated from the limits of proper dissent.

It will be demonstrated that proscribing the appellant's intentional physical act of desecration, in public, is made essential by the legitimate state interests of averting the danger of breaches of the peace and thereby promoting the safety and proper functioning of a state within its self-governing borders, as well as preserving the "dignity of the Flag, the Flag that is the hope of the world and the Symbol of what perhaps is the last true democracy on the face of the earth, today."[8] The right to convey a message, particularly by dissentients, is made available and indeed encouraged through more proper and acceptable channels of communication other than by the offensive, disdainful and "incendiary" means of publicly and designedly de-

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[7] See pp. 72-73 *infra*.

[8] *People* v. *Picking*, Misc. , 23 N.Y.S. 2d 148, 149 N.Y.C. Mag. Ct. (1940), *aff'd*, 263 App. Div. 366 (First Dept. 1942), *aff'd*, 288 N.Y. 644, 42 N.E. 2d 741 (1942), *cert. denied*, 317 U.S. 632 (1942).

secrating the American flag by burning. The State of New York, in enforcing the pertinent statute, does not seek in any way whatever to censor or "chill" underlying concepts or views, which are government's most effective process for self-correction. Nor is there any aim to compel adherence to an exaggerated or super-patriotism on the part of its inhabitants.

Legitimate alternatives for expression are also ensured by New York State's own Article 1, Section 8, of its Constitution, *supra*. It will also be shown that the verbal language expressed by the appellant was not the *sine qua non* of his conviction. Its fortuitous presence served merely as a guide in assisting the trial court in the proper assessment of the appellant's state of mind at the time he set fire to "Old Glory," thereby obviating any dire possibility of a wrongful conviction, if indeed an innocently-conceived act was accidentally or inadvertently committed (see note 2 *supra* at 4). However, it is respectfully urged that even in cases not involving any physical acts whatever, but purely parol language fashioned to publicly profane this Nation's flag, the identical peril is present. "Desecrating" speech, too, cannot serve as a rational and salutory means for societal self-improvement through discussion, for its primary aim when so expressed with reckless, insurgent and inflammatory abandon, is to chip away at the very foundations of a democratic way of life. Thus, the need to repel dangerous, defiant, or refractory overtones dictates the exigency of protecting the safety and well-being of a free and orderly society, while simultaneously shielding a "rallying symbol" from abuses tending to threaten and, perhaps, obliterate the vital meaningfulness of a time-honored reminder of the ideals of our Nation and the better life it solemnly and perpetually promises to all.

These genuine concerns transcend individual liberties without unconstitutionally denigrating fundamental safeguards for only in the necessary infringement upon freedom of speech, in whatever form one may believe he is attaching symbolic significance, can all of us be assured that a greater good will be accomplished.

In sum, the thrust of the arguments of the State of New York is that the statute does not proscribe orthodox conduct and leaves inviolate free and fearless discussion of public issues, even by way of criticising the shortcomings of our Government, so that needful changes may be enhanced.

The statute does *not* mandate *affirmative* acts of respect for the flag, and the State, in its fundamental right of self-preservation, may pursue the exercise of its police power in a legitimate manner. In so doing, cherished liberties secured to each of us by our Founding Fathers may properly be required to yield to the greater need for a society in which peace, good order and tranquility will not be subjected to possible endangerment, or its security threatened.

The act for which the appellant was arrested and convicted cannot be condoned because it endangers the structure of duly constituted government, and prohibits in clear, precise, and unequivocal language, intentional, wilful, not accidental or inadvertent, public acts and language which cast dishonor upon an emblem of our sovereignty for which Americans have lived and died from the earliest days of the Republic. And in interdicting the use of "words or acts," in which the aforementioned dangers may find expression, the State, in protecting itself as well as the Nation, has not, by this clear and narrowly drawn statute, created any difficulty for anyone in comprehending just what will bring him within the ambit of its proscription.

ARGUMENTS

A.

The statute clearly and precisely delineates the boundaries of its proscription and since protected conduct cannot be swept within its ambit, any contentions that it suffers from vagueness and impermissible overbreadth are untenable.

Section 1425, subdivision 16, paragraph d, of the Penal Law of the State of New York, *supra*, by its very language clearly prohibits only the *intentional and wilful*, rather than accidental or inadvertent, physical acts, or utterances, which are designed to defile the flag. Subdivision 16, paragraph d, of the statute, *supra*, employs the descriptive language "mutilate", "deface", "defile", "defy", "trample upon", and "cast contempt", each of which have well-defined dictionary meanings and manifestly evince *a mental attitude* on the part of the perpetrator to do an act which has for its undoubted purpose the desire to desecrate the flag. It now becomes necessary to parse the statute in order to learn its meaning. Webster's New International Dictionary (Unabridged, 2nd ed., 1952) sets forth the following definitions:

- To *mutilate* is "to maim; cripple; hack; . . . [t]o destroy or remove a material part of, so as to render imperfect." (*Id.* at 1617.)

- To *deface* is "[t]o destroy or mar the face of or external appearance." (*Id.* at 686.)

- To *defile* is "to crush, outrage . . . [t]o make filthy; to dirty; befoul; to corrupt the purity or perfection of; to debase . . . [t]o sully; to tarnish . . .; to dishonor. (*Id.* at 688.)

- To *defy* is "[t]o renounce or dissolve all bonds of affiance, faith or obligation with; to reject, repudiate, or renounce . . . [t]o declare war against; to challenge to combat . . . [t]o despise; disdain . . . . [t]o set at naught." (*Id.* at 689.)

- To *trample upon* is "to tread heavily so as to bruise, crush, or injure; . . . . to inflict injury or destruction; to make encroachments in a contemptuous and ruthless fashion." (*Id.* at 2688.)

- To cast *contempt* is the "[a]ct of contemning, or despising; the feeling with which one regards that which is esteemed mean, vile, or worthless; disdain; scorn . . . . derision, contumely." (*Id.* at 575.)

It is beyond cavil that the words of the statute hereinabove defined are words which spell out design, and are words entirely unrelated to accidental or inadvertent occurrences. They are of such tenor that it becomes most difficult to envision any misinterpretation that can be possibly made by an observer, particularly a police officer, so that an innocent person might be swept within the boundaries of the statute's proscription. Whereas one may have contempt for a person or thing, and such contempt finds repose in the recesses of one's mind, acts of "publicly *mutilat*[*ing*], *defac*[*ing*], *defil*[*ing*], *defy*[*ing*], *trampl*[*ing*] *upon* or *casting contempt* upon either by words or act . . . . the flag of the United States of America" (emphasis supplied), are by the very nature of things, *decisive* performances which the actor must express overtly since it becomes clear that he no longer can contain himself and be satisfied with just having a reticent mental attitude. Since the aforementioned words of the instant statute import a state of mind, the overt public expression of such an attitude, whether "by words or act," leaves residues of easily recog-

nized qualities and abundant evidence of motivation from which accurate and facile judgments by others can be made that at the time the statute was offended the intent to do so was present. Thus, both the perpetrator and the observer, are simultaneously made aware that the American flag has been impugned, and questions of guilt or innocence are not left within the realm of conjecture or imponderables. There will be no danger that the conduct will be judged *solely* by the eyes of the beholder; the actor himself, as gleaned from the words of the statute, will create the atmosphere from which his culpability will be easily discerned and with minimal effort.

Thus, since the agent by his overt manner intends to convey a "message of contempt," the ill-feeling which cannot remain concealed, will result in no misinterpretation as is likely when an act or statement is born of inadvertence or accident. His very deportment at the time of the desecration, even without one word being spoken, proclaims the contempt which the statute seeks to forbid. What satisfaction can be gained by the desecrator if his malevolent purpose fails to signal impressions which will be comprehended by the audience he seeks to reach? No more than could have Alexandre Dumas' legendary hero, the Count of Monte Cristo, if, as a solitary figure incarcerated in the Château D'If,[9] he frantically sought to hold up to scorn the inequities of his enemies and found no one within the reach of hearing to importune with his plaints. Silence and unobtrusive behavior are certainly not the implements of one who publicly desecrates the American flag for the reasons which prompt him in committing such a condemnable act must in-

[9] Collier's Encyclopedia, 1967, Vol. 8, p. 418, col. 2; p. 419, col. 1 (Alexandre Dumas *pere*).

deed be very strong. The circumstances surrounding the physical act, or, if there be no act, pure language employed, leave no doubt whatever to onlookers what was intended, and what the incited and disrespectful consequences will be. He most certainly will display anger on his face which will act as a guide in determining the intent to do a wrongful act.

Although the particular portion of the statute in issue refers to the disjunctive "or," immediately preceding the words "cast contempt," it becomes crystal clear from the foregoing that the Legislature had intended to employ the conjunctive "and," since all of the proscribed acts set forth in paragraph 16, subdivision d, of the statute, *supra,* are described by words having related meanings,[10] and are all words bringing to the fore, "by words or act," similar mental attitudes to degrade the American flag. If any doubts are to be expressed with regard to the clarity of any of the words preceding the language "or cast contempt," it is respectfully submitted that the wordage "or cast contempt" is of such meaningfulness that its purport at the time of its insertion into the statute many years ago was to give each of the other words an interpretation compatible with the statute's design to punish the *deliberate* degrading of the flag. The ancient maxim, *qui haeret in littera, haeret in cortice,* takes on particular significance here, for the law, in recognizing the ductility of words, will not adhere to the letter of a statute if in doing so its general purpose and policy becomes nullified, rather than promoted. (See *Riggs v. Palmer,* 115 N.Y. 506, 510, 22 N.E. 188, 189 [1889]; *Department of Welfare of the City of New York v. Siebel,* 6 N Y 2d 536, 545, 161 N.E. 2d 1, 6 [1959], *appeal dismissed,* 361 U.S. 535, 80 S. Ct. 586 [1960].) In the latter case, the

[10] See pp. 13-14 *supra.*

New York Court of Appeals substituted "and" for "or," in order to carry out the intended meaning of the statute in issue. It is noteworthy that Federal legislation covering flag desecration which was passed by the House of Representatives in 1967, and which passed the Senate on June 24, 1968, following an amendment which added the word "knowingly," reads in its pertinent parts as follows:

> "Whoever knowingly *casts contempt upon any flag of the United States by* publicly mutilating, defacing, defiling, burning or trampling upon it shall be fined not more than $1,000 or imprisoned for not more than one year, or both".[11] (Emphasis supplied.)

It is the State's contention that the permissible substitution of the conjunctive "and" in place of the disjunctive "or," in the New York statute immediately before the language "cast contempt," in effect makes the words "cast contempt" the dominant and key language which serves to render intelligible the other acts designated therein. The format of the Federal enactment, *i.e.*, "mutilating, defacing, defiling, burning or trampling upon", *supra*, clearly indicates that these descriptive words are merely illustrative of "casts contempt", the latter, it is reiterated, being defined, in part, as a "*feeling*" with which one regards that which is esteemed mean, vile, or worthless." Webster's New International Dictionary (Unabridged, 2nd ed. 1952), *supra*, (emphasis supplied). The word "esteem" is also construed as "regard," a word which implies "perception" or "recog-

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[11] The federal legislation sponsored by Congressman Byron G. Rogers, First District Colorado, is the result of Hearings before Sub-Committee No. 4 of the Committee of the Judiciary, House of Representatives, 90th Congress, 1st Session, 1967. (H.R. 10480, chapter 33, title 18, U.S.C.A., Sec. 700, subsec. [c]). This new act was signed into law by President Johnson on July 5, 1968.

nition," language, also, which unequivocally connotes a mental awareness or consciousness, not accidental or unintentional. The New York statute, likewise, is clearly defined notwithstanding the transposition of words which in no wise fails to convey the true meaning intended and the uncomplicated recognition which arises when a person means to shame and dishonor the object of his maleficence—the American flag.

Although the Federal enactment contains the word "knowingly," it is repectfully submitted that since the words employed in that statute makes obvious that the desecration must be intentional and wilful, the inclusion of "knowingly" becomes mere surplusage, and was no doubt inserted expediently in order to obviate any possible and baseless claim that the statute is vague. An essential ingredient in the word "knowingly," is some blameworthy condition of mind. It is inescapable that the word refers to what is characterized in the criminal law as *mens rea*. The import of the language of the statute, "mutilate, deface, defile, or defy, trample upon, or cast contempt upon" are sufficiently clear, it is reiterated, to bespeak of an attitude of mind so that words such as "knowingly," "intentionally," or their adverbial equivalents, are not actually required to elucidate that which was obviously intended at the time the Legislature promulgated the desirable legislation. At times, even the absence of the word "knowingly," or its equivalents, in a statute, has been held not to be conclusive, and whether words are deemed to express an intent or guilty knowledge becomes a matter of construction "by considering the subject matter of the statute, *the language of the act*, the evil sought to be eradicated or prevented, and the consequences of the several constructions to which the statute may be susceptible." (*State* v. *Laundy*, 103 Ore.

443, 500, 204 P. 958, 977 [1922] [emphasis supplied].) Certainly, by considering the language of the act now before this Court, the words by their common usage can be considered as expressing a guilty knowledge or intent. Courts are "slow to find a legislative intent to condemn a man for not knowing that which he cannot know." (*People* v. *Rice*, 161 Mich. 657, 664, 126 N.W. 981, 984 [1910].) The danger, therefore, for rash judgment which might wrongfully convict, is nil.

In *Dennis* v. *United States*, 341 U.S. 494, 500, 71 S.Ct. 857, 862 (1951), this Court referred to words such as "knowingly," "maliciously," "wilfully," or "combinations or permutations of these and synonymous terms," and acknowledged that the "existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." Similarly, in *American Communications Association* v. *Douds*, 339 U.S. 382, 411, 70 S. Ct. 674, 690 (1950), Mr. Chief Justice Vinson, speaking for the majority, aptly stated:

> "[T]he state of a man's mind must be inferred from the things he says or does. Of course we agree that the courts cannot 'ascertain the thought that has no outward manifestation.' But courts and juries every day pass upon knowledge, belief and intent—the state of men's minds—having before them no more than evidence of their words and conduct, from which in ordinary experience, mental condition may be inferred."

Since the flag desecrator will wish to display obvious signals of his feelings when the "words or act" portraying his contempt are ignited and brought to the fore, he will not allow himself to be frustrated in attaining his aim. Thus,

the statute cannot be criticized since it gives clear notice of what is proscribed, and contains nothing with which to ensnare the innocent. In *Beauharnais* v. *Illinois*, 343 U.S. 250, 264, 72 S.Ct. 725, 734 (1952), such words as virtue, *derision*, *obloquy*, depravity, and *contempt*, found in the Illinois group libel statute, were approved by this Court as clear and concise, against claims of vagueness. It is to be noted that the words herein emphasized are synonyms of some of the words in the statute now before this Court.

It is significant that Chief Judge Fuld in speaking for a unanimous court begins by stating, "We are called upon to decide whether the *deliberate* act of burning the American flag in public as a 'protest' may be punished as a crime." (*People* v. *Street*, 20 NY 2d [1967], *supra* at 234, 229 N.E. 2d at 189, appellant's Appendix 4a; emphasis supplied.) Later in the opinion, reference is made to the statute's purpose as discouraging "*contemptuous* and *insulting* treatment of the flag in public."[12] (*Id.* at 236, 229 N.E. 2d at 190, appellant's Appendix 8a; emphasis supplied.) And in narrowing the issue before it the New York Court of Appeals aptly states, "We need not at this time concern ourselves with a display of the flag in a manner which clearly does not manifest an *intention* to desecrate it." (*Id.* at 237, 229 N.E. 2d at 191, appellant's Appendix 9a; emphasis supplied.)

Thus, the New York Court of Appeals has recognized the meanings of the words in the instant statute "mutilate,

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[12]Webster's New International Dictionary (Unabridged, 2nd ed., 1952), *supra*, defines the following:

Contemptuous—"Manifesting, feeling or expressing contempt or disdain . . . *Syn.*—Haughty, insolent, supercilious, contumelious." (*Id.* at 575.)

Insulting—"Containing, or characterized by insult or indignity . . . *Syn.*—Insolent, offensive." (*Id.* at 1289.)

deface, defile or defy, trample upon, or cast contempt upon," by interpreting them as inherently representing a state of mind, an intention to do what the statute seeks to proscribe.

In *People* v. *Finkelstein*, 9 N.Y. 2d 342, 174 N.E. 2d 470 (1961), the same court, by a majority, in interpreting the then existing section 1141 of the Penal Law of the State of New York, regarding obscene material, read into the statute the requirement of "scienter," because of the "strong constitutional presumption attending legislative enactments [citing cases] that the statute was not intended to unreasonably restrict or inhibit our inalienable 'liberty' protected by due process . . . [A] mere omission of the word *'scienter'* need not be construed as an attempt to eliminate that common-law element of the crime. (See *Morrissette* v. *United States*, 342 U.S. 246 . . .)" (*Id.* at 344-45, 174 N.E. 2d at 471; emphasis in original.) And in *Winters* v. *New York*, 333 U.S. 507, 510, 68 S. Ct. 665, 667 (1948), this Court pointed out that in *Fox* v. *Washington*, 236 U.S. 273, 277, 35 S. Ct. 383, 384 (1915), it had affirmed "a conviction under the stated limitation of meaning." This Court also stated in *Winters, supra,* that the *construction* by the New York Court of Appeals "puts these words in the statute as definitely as if it had been so amended by the legislature." (*Winters* v. *New York*, 333 U.S., *supra* at 514, 68 S. Ct. at 669).

Such an interpretation, which unlike the statute in *Finkelstein, supra,* is not required to be made here because the words contained therein are more susceptible to understanding, and are actually of a nature *res ipsa loquitur.* Thus, no argument would be tenable which would have for its postulate the assertion that the appellant herein was

prosecuted under any *ex post facto* law[13] since the New York Court of Appeals did not legislate words such as "knowingly," "intentionally," or equivalent terminology into the flag desecration statute, but, rather, accorded the language the sense which was already openly expressed within.

Thus, the manifest understanding by the New York Court of Appeals below, albeit expressed in somewhat indirect language,[14] is that intent be present in order to justify a conviction for flag desecration, and this interpretation, it is respectfuly submitted, becomes binding upon this Court. (See *Hebert* v. *Louisiana*, 272 U.S. 312, 317, 47 S. Ct. 103, 104 [1926]; *Skirotes* v. *Florida*, 313 U.S. 69, 79, 61 S. Ct. 924, 930 [1941]; *Winters* v. *New York*, 333 U.S. 507 [1948], *supra* at 514, 68 S. Ct. at 665, 669; *Adderley* v. *Florida*, 385 U.S. 39, 46, 87 S. Ct. 242, 247 [1966].)

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[13] Such an argument was advanced in the New York Court of Appeals by the defendants in the second *Finkelstein* case (11 N.Y. 2d 300 [1962]) following reversal, and the determination by the court's majority that "[a]lthough they can be charged 'with knowledge of the scope of subsequent interpretation' (*Winters* v. *New York* . . .), we still feel that new trials are warranted by the circumstances and in the interests of justice, so that although the People have the burden of proof, defendants may have an opportunity to testify or offer proof, if they desire, in regard to the presence of salacious material in their possession for sale." 9 N.Y. 2d (1961), *supra* at 347-48, 174 N.E. 2d at 472. The rationale was that since the defendants had no reason to believe that *scienter* was required, they no doubt did not take the witness stand to assert what might be deemed a futile defense of lack of knowledge. Compare *Smith* v. *California*, 361 U.S. 147, 80 S. Ct. 215 (1959) in which the trial and appellate courts construed an ordinance as creating absolute criminal liability for mere possession of a book later judicially determined to be obscene, even though he had no knowledge as to the nature of its contents. This Court was constrained to reverse the judgment of conviction.

In any event, the appellant herein apparently understood what the statute required—wilfulness to desecrate—for the tenor of his defense was one of exculpation (24a-25a).

[14] See p. 20 *supra*.

That the statute requires a purposeful attitude to dishonor the flag has been recognized in other jurisdictions. In *State* v. *Schlueter*, 127 N.J.L. 496, 499, 23 A. 2d 249, 250-51 (Sup. Ct., New Jersey 1941), the court, in affirming a self-confessed Nazi's conviction for tearing a small American flag and throwing it to the ground, stated:

> "We understand that the statute, in making it a misdemeanor to deface or to defile the flag, used those words in their meaning of 'dishonor'. 'Dishonor' is *purposeful. The word implies a lively sense of shaming or an equivalent acquiscent callousness.* For illustration: a blind man stumbles over the flag and, not knowing what it is, walks upon it and then casts it aside. Has he 'trampled' upon the flag? Has he 'defaced' or 'defiled' it? Has he 'dishonored' it? We think not; because those words carry with them, by inherent meaning, an attitude of mind . . ." (Case, J.) (Emphasis supplied.)

This purposefulness and "lively sense of shaming" is determined by the atmosphere surrounding the dishonor, and in the context in which the "words or act" occurred.

Similarly, in *Hinton* v. *State*, 223 Ga. 174, 177, 154 S.E. 2d 246, 249 (1967), the court held that "it was not error, in the absence of a proper request, to fail to define in the charge to the jury the terms in such statutes [dealing with the mutilation and defacement of national and state flags] *which needed no definition to be understood by the jury.*" (Emphasis supplied.)

Appellant's reliance on *Baggett* v. *Bullitt*, 377 U.S. 360, 84 S. Ct. 1316 (1964), is inappropriate. (See Brief for Appellant, p. 9.) The "range of activities" referred to in *Baggett, supra* at 371, 84 S. Ct. at 1322, which might be con-

sidered disrespect following the taking of oaths by teachers, said oaths designed to combat subversive conduct, cannot be equated with "words or act[s]" (sec. 1425, subd. 16, para. d, of the Penal Law of the State of New York, *supra*) aimed at desecrating our flag. Although Mr. Justice White, in *Baggett, supra,* conjectures that within the "range of activities . . . . [e]ven criticism of the design or color scheme of . . . flag or unfavorable comparison of it with that of a . . . foreign country could be deemed disrespectful and therefore violative of the oath" (*id.* at 371, 84 S. Ct. at 1322), it must be emphasized again that "criticism" or "unfavorable comparison" do not, per se, establish any mental attitude, favorable or unfavorable, without additional signs, which only a "*lively* sense of shaming" (*State* v. *Schlueter,* 127 N.J.L. 496, 499, 23 A. 2d 249, 250-51, *supra;* emphasis supplied), makes available. Innocuous-appearing conduct, by "words or act," will not lead to retaliation.

Only casuistry can make vague and nebulous what is truly intelligible and without the realm of ambiguity. And the appellant is not accurate when he states that one is not required to " 'gamble' on whether his form of expression is or is not permitted". (Brief for Appellant, p. 14.)

In *United States* v. *Wurzbach,* 280 U.S. 396, 399, 50 S. Ct. 167, 169 (1930), Mr. Justice Holmes aptly stated:

> "Whenever the law draws a line there will be cases very near each other on opposite sides. The precise course of the line may be uncertain, but no one can come near it without knowing that he does so, if he thinks, and if he does so it is familiar to the criminal law to make him take the risk. *Nash* v. *United States,* 229 U.S. 373."

Again, in *Roth* v. *United States*, 354 U.S. 476, 491-92, 77 S. Ct. 1304, 1312-13 (1957), Mr. Justice Brennan reiterated the identical legal proposition as follows:

> "This Court . . . has consistently held that a lack of precision is not in itself offensive to the requirements of due process. '[T]he Constitution does not require impossible standards'; all that is required is that the language 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices . . . .' *United States* v. *Petrillo*, 332 U.S. 1, 7-8 [1947]. [The words used must] give adequate warning of the conduct proscribed and mark' . . . boundaries sufficiently distinct for judges and juries fairly to administer the law. . . . That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense."

The "risk," or "gamble" on whether a form of expression will be required to yield to the public weal, and upon which the appellant has placed great concern (Brief for Appellant, p. 14), although, it is respectfully reiterated, does not actually pose any significant problem whatever because of the clarity of the words employed in the statute, was also given considered interpretation by Mr. Justice Frankfurter when he tersely enunciated in a dissenting opinion in *Winters* v. *New York*, 333 U.S. 507, 68 S. Ct. 665 (1948), *supra*:

> "What risks do the innocent run of being caught in a net not designed for them? How important is the policy of the legislation, so that those who really like to pursue innocent conduct are not likely to be caught unaware? How easy ~~it is~~ to be explicitly

particular? How necessary is it to leave a somewhat penumbral margin but sufficiently revealed by what is condemned to those who do not want to sail close to the shore of questionable conduct? These and like questions confront legislative draftsmen. Answers to these questions are not be to found in any legislative manual nor in the work of great legislative draftsmen. They are not to be found in the opinions of this Court. These are questions of judgment, peculiarly within the responsibility and the competence of legislatures. The discharge of that responsibility should not be set at naught by abstract notions about 'indefiniteness.' (*Id* at 525-26, 68 S. Ct. at 675.)

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"[A] man runs the risk of having a jury of his peers misjudge him. Mr. Justice Holmes has given the conclusive answer to the suggestion that the Due Process Clause protects against such a hazard: 'the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment, as here; he may incur the penalty of death'. *Nash* v. *United States,* 229 U.S. 373, 377. (*Id.* at 535, 68 S. Ct. at 679.)

• • • • •

"The Court has been led into error, if I may respectfully suggest, by confusing want of certainty as to the outcome of different prosecutions for similar conduct, with want of definiteness in what the law prohibits. But diversity in result for similar conduct in different trials under the same statute is an unavoidable feature of criminal justice. So long as these diversities are not designed consequences but due merely to human fallibility they do not deprive persons of due process of law. (*Id.* at 535, 68 S. Ct. at 679.)

> "In considering whether New York has struck an allowable balance between its right to legislate in a field that is so closely related to the basic function of government, and the duty to protect the innocent from being punished for crossing the line of wrongdoing without awareness, it is relevant to note that this legislation has been upheld as putting law-abiding people on sufficient notice, by a court that has been astutely alert to the hazards of vaguely phrased penal laws and zealously protective of individual rights against 'indefiniteness.' See, e.g., *People* v. *Phyfe*, 136 N.Y. 554, 32 N.E. 978; *People* v. *Briggs*, 193 N.Y. 457, 86 N.E. 522; *People* v. *Shakun*, 254 N.Y. 107, 167 N.E. 187; *People* v. *Grogan*, 260 N.Y. 138, 183 N.E. 273." (*Id.* at 535-36, 68 S. Ct. at 680.)"

Accord, Roth v. *United States*, 354 U.S. 476 [1957], *supra*, note 30 at 492, 77 S. Ct. 1304, 1313, wherein Mr. Justice Brennan stated in the majority opinion:

> "It is argued that because juries may reach different conclusions as to the same material, the statutes must be held to be insufficiently precise to satisfy due process requirements. But, it is common experience that different juries may reach different results under any criminal statute. That is one of the consequences we accept under our jury system." *Cf. Dunlop* v. *United States*, 165 U.S. 486, 499-500."

"Risk" and "gamble" are obviated when one begins to realize "that the meaning of a statute is to be looked for, not in any single section, but in all the parts together and in their relation to the end in view." *Panama Refining Co.* v. *Ryan*, 293 U.S. 388, 499, 55 S. Ct. 241, 256 (1935), (Cardozo, J., dissenting).

That police officers may, in rare instances, mistakenly chance to translate innocuous "words or act[s]," as dis-

plays of flag desecration, albeit the statute's clarity is beyond impediment, creates no greater basis for impugning that which legislators deemed expedient to enact so many years ago.[15] All that can be required is that a police officer act in good faith.

> "We will not demand of the officer that he weigh the circumstances confronting him with the detachment and precision of a laboratory technician . . . No more is required of him than that he act with the prudence and reason demanded of any responsible official in the conduct of his duties, in the light of surrounding circumstances." (*People* v. *Zeigler*, 358 Mich. 355, 373, 100 N.W. 2d 456, 467 [1960] (Smith, J., dissenting).)

Nor is the peril within the realm of probability that the passerby, other than one detailed to ferret out wrongdoers, to whom the law has referred as the average person, as indeed he is, will define innocent acts involving the American flag as those which will tend to incite him to violence. For the revered Mr. Justice Holmes in discussing intentional wrongs recognized that "even a dog distinguishes between being stumbled over and being kicked". Holmes, *The Common Law* 3 (1881).

The clarity of the language of the instant statute being without doubt will not bring into play any considerations whether statutory presumptions are now to be resorted to in order to define the lines of the law. Thus, no statutory presumption will be permitted to plague this Court and, perchance, risk the danger of its condemnation as "a means of an escape from constitutional restrictions". (Compare *Bailey* v. *Alabama*, 219 U.S. 219, 239, 31 S. Ct. 145, 151 [1911] [Hughes, J.].)

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[15] New York's statute was derived from Chap. 272, Sec. 1, of Laws of 1903.

Statutory language, though seemingly capable of varied mental manipulations, finds greater meaning in its application. It cannot be gainsaid that many words in our language, the meanings of which are far less clear than are words as "mutilate, deface, defile, . . . defy, trample upon, or cast contempt upon," throw off their veils of ambiguity when their applications in our everyday experiences affect our senses. It is undeniable that notwithstanding the premise that those less versed in language may have greater obstacles to overcome in the path of understanding, somehow all rational people, again made up of "average" persons, walk through the same doorway of comprehension when language comes to life.

No one can deny that such expressions as "hard-core pornography" (*People* v. *Richmond County News*, 9 N.Y. 2d 578, 175 N.E. 2d 681 [1961]); "predominant appeal to prurient interest;" "shameful or morbid interest in nudity, sex, or excretion;" "goes substantially beyond customary limits of candor in description or representation of such matters," (*Roth* v. *United States*, 354 U.S. 476 [1957]), *supra*, note 20 at 487, 77 S. Ct. 1304, 1310); "patent offensiveness" (*Manual Enterprises Inc.* v. *Day*, 370 U.S. 478, 486, 82 S. Ct. 1432, 1436 [1962]), and a host of others, have even hazier meanings than the simple words found in section 1425, paragraph 16, subdivision d, of the Penal Law of the State of New York, *supra*. Yet they have never been denigrated by this Court for reasons of vagueness. Much can be said for Mr. Justice Stewart's apt statement in *Jacobellis* v. *Ohio*, 378 U.S. 184, 197, 84 S. Ct. 1676, 1683 (1964), when in discussing the application of the test of "hard-core pornography" he stated:

> "It is possible to read the Court's opinion in *Roth* v. *United States* and *Alberts* v. *California*, 354 U.S. 476, in

a variety of ways. *In saying this, I imply no criticism of the Court, which in those cases was faced with the task of trying to define what may be indefinable.* I have reached the conclusion, which I think is confirmed at least by negative implication in the Court's decisions since *Roth* and *Alberts*, that *under the First and Fourteenth Amendments criminal laws in this area are constitutionally limited to hard-core pornography. I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it*, and the motion picture involved in this case is not that. (Emphasis supplied.)

And so shall deliberate flag desecration be recognized when it occurs for one will "know it when [he] sees it". The events giving rise to the offense cannot but represent dramatically, and in a culpable fashion, an innervated state of mind to do dishonor to that which the statute attempts to shield. The brisk words of the subject statute are neither "vague and fluid," nor "a trap for the innocent as the ancient laws of Caligula." (Compare *United States* v. *Cardiff*, 344 U.S. 174, 176, 73 S. Ct. 189, 190 [1952] [Douglas, J.]).

The phrase "unreasonable manner" found in a state's disorderly conduct statute, was ruled sufficiently clear to give adequate warning of what the statute was designed to interdict. According to the court, the term "merely articulates the standard of judgment which would be applicable even in its absence." (*United States* v. *Woodward*, 376 F. 2d 136, 141 [7th Cir. 1967] [Swygert, J.])

The appellant's claims of vagueness and overbroadness are such vital issues in the determination of this appeal that

the State of New York becomes impelled to amplify its discussion and analysis of the principles of constitutional interpretation in these fields. For the State of New York is cognizant, particularly in these critical times in the development of our democratic institutions, that a statute imbued with the salutary aim of preserving the dignity of this Nation's flag, even over and above any immediate considerations of possible risk of breaches of the public peace which may be occasioned by such inflammatory behavior, becomes one of paramount importance.

Mr. Justice Frankfurter, too, cautioned that the laws are not necessarily recondite and esoteric manipulations of language, to be resorted to in order to thwart legislative purposes. And as he so well elucidated:

> "Like others, judges too listen with what psychologists used to call the apperception mass, which I take means in plain English that one listens with what is already in his head. One . . . caution is relevant when one is admonished to listen attentively to what a statute says. One must also listen attentively to what it does not say.
>
> "We must, no doubt, accord the words the sense in which [the legislature] used them. That is the only way of stating the central problem of decoding the symbols. It will help to determine for whom they were meant. Statutes are not archaeological documents to be studied in a library. They are written to guide the actions of men. . . .
>
> "And so we assume that [the legislature] uses common words in their popular meaning, as used in the common speech of men. The cases speak of the 'meaning of common understanding,' 'the normal and spontaneous meaning of language,' 'the common and appropriate use,' 'the natural, straightforward

and literal sense,' and similar variants." (Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 536 [1947].)[16]

If the instant statute had been so constituted as to forbid "dropping," "creasing," "wrinkling," or "discoloring," the American flag, words which do not inherently signify an insolent attitude of mind, but are equally construable as inadvertent or otherwise innocent occurrences, contentions of vagueness and "blurred signposts to criminality" (compare *United States* v. *Congress of Industrial Organizations*, 335 U.S. 106, 142, 68 S. Ct. 1349. 1367 [1948], might very well be deserving of serious consideration by this Court. But these words as hereinabove illustrated are unlike those actually found in the statute since the Legislature was wise to embrace only language denoting comportment indisputably fused with spiteful design to inflict injury upon an object sought to be protected, and which behavior could in no wise be misconstrued by any onlooker. A multitude of types of conduct was not inserted into the statute, and the language actually selected narrows the scope of the offense, and vouchsafes its lucidity.

And thus in its clarity, the public, and particularly those charged with law enforcement, are concisely apprised of the behavior and language which the statute seeks to prohibit, and creates clear guidelines for the prevention of breaches of the public peace, and disrespect for what Dr. Oliver Wendell Holmes, Sr. called an "emblem of justice." Since the wording of the subject statute does not becloud the sanctions inherent therein, there is no violation of the due process clause of the Fourteenth Amendment. (Compare

[16] From the Sixth Annual Benjamin N. Cardozo Lecture delivered before the Association of the Bar of the City of New York March 18, 1947.

Giacco v. *Pennsylvania*, 382 U.S. 399, 402-03, 86 S. Ct. 518, 520-21 [1966].) Risks of prior restraint and censorship are not evident from the clear language of the statute. Nor is there any imminence that there will be a suppression in the conveyance of ideas. The statute, narrowly drawn, does not leave in an unreasonable and discriminatory fashion the determination as to what "words or act" will violate its terms. (Compare *Lovell* v. *Griffin*, 303 U.S. 444, 58 S. Ct. 666 [1938]. *Cantwell* v. *Connecticut*, 310 U.S. 296, 60 S. Ct. 900 [1940]; *Saia* v. *New York*, 334 U.S. 558, 559-60, 68 S. Ct. 1148, 1149-50 [1948]; *but cf. Kovacs* v. *Cooper*, 336 U.S. 77, 82-83, 69 S. Ct. 448, 451 [1949].)

The paucity of prosecutions involving flag desecration cannot be ignored, and has, it is respectfully submitted, a telling effect upon the appellant's concern that statutes of this nature may result in the hazard of unreasonable and discriminatory application.[17]

And the cases referred to by the appellant (Brief for Appellant, p. 12; n. 4 at 13) as within "[t]he broad range of conduct to which the statute has been applied in New York," are those which in the light of all the circumstances, tend to depict strongly the presence of contempt in the treatment of the American flag, although in *People* v. *Place* (Brief for Appellant, p. 13), extenuating circumstances may have prompted the prosecutor to move for a dismissal of the charge. The flag, in *Place, supra*, had been used in a play as

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[17] Chief Judge Fuld in the court below, points out that "[h]appily the courts have not been called upon to apply the statute, or others like it, with any degree of frequency." (Appellant's Appendix 8a).

Attorney General Ramsey Clark refers to today's flag desecrators as "infinitesimal" in number. (Hearings Before Subcommittee No. 4 of the Committee on the Judiciary, House of Representatives, 90th Congress, 1st Session [Serial No. 4], p. 120.)

a "prop." In *People* v. *Radich*, 53 Misc. 2d 717, 279 N.Y.S. 2d 680 (1967), *aff'd w/o opinion*, Misc. 2d , N.Y.S. 2d (1968), leave to appeal to New York Court of Appeals granted, N Y 2d (1968), the flag was used in a lewd manner which the defendant claimed to be a form of "protest art," in order to give vent to his feeling concerning the Vietnam issue. Can such obnoxious and malefic conduct ever leave any reasonable doubt as to the sentiment intended by the perpetrator with regard to the United States flag? (For pictures of this "art," see reference in Life Magazine, note 40 at 74 *infra*.)

The appellant attempts to strengthen his claim that the statute is vague and overbroad by noting instances wherein statements "would be vulnerable to prosecution under the statute" (Brief for Appellant, pp. 8-9). Yet such suggested statements are not difficult to interpret if we accept the notion, as has been advanced in detail by the State of New York, that any statements involving public issues which tend to encourage the constructive processes of self-government when political discussion remains unhampered, will invariably not be mistaken for desecration. Of course, the calumnious reference to the flag as "a damn flag" will not obfuscate the contrary impression that will be made, and will effectively stimulate resentment on the part of the listener. In *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 574, 62 S. Ct. 766, 770 (1942), this Court concluded that "*damned* racketeer" and "*damned* Fascist" [were] epithets likely to provoke the average person to retaliation. . ." (Emphasis supplied.)

The requirement of prominently displaying an American flag at "[a]ll assemblies, warranted by law, held in any of the streets of the city, where public discussions are held"

(section 435-8.0(a), New York City Administrative Code), does not magnify the danger that First Amendment freedoms will become stifled because law enforcement officials may construe any "given speech as one which 'casts contempt' upon or 'defies' the displayed American flag." (Brief for Appellant, p. 8.) To reiterate, the dearth of cases involving arrests and prosecutions for flag desecrations, in the many states with similar legislation, simply because of the presence of the flag at public gatherings, whether indoors or outdoors, where orators have often spewed contempt for our Country, is indeed enlightening in weighing the peril which appears to be giving the appellant such grave, and undue concern.

In *Scales* v. *United States*, 367 U.S. 203, 229, 81 S. Ct. 1469, 1486, Mr. Justice Harlan in speaking for the majority, in a case involving the Jencks Act, 18 U.S.C. Section 3500, stated:

> "If it is said that the mere existence of such an enactment intends to inhibit the exercise of constitutionally protected rights, in that it engenders an unhealthy fear that one may find himself unwittingly embroiled in criminal liability, the answer surely is that the statute provides that a defendant must be proven to have knowledge of the proscribed advocacy before he may be convicted. It is, of course, true that quasi-political parties or other groups that may embrace both legal and illegal aims differ from a technical conspsiracy, which is defined by its criminal purpose, so that *all* knowing association with the conspiracy is a proper subject for criminal proscription as far as First Amendment liberties are concerned. If there were a similar blanket prohibition of association with a group having both legal and illegal aims, there would indeed be a real danger that

legitimate political expression or association would be impaired, but the membership clause, as here construed, does not cut deeper into the freedom of association than is necessary to deal with the 'substantive evils that Congress has a right to prevent.' *Schenck* v. *United States*, 249 U. S. 47, 52. The clause does not make criminal all association with an organization which has been shown to engage in illegal advocacy. *There must be clear proof that a defendant 'specifically intend*[*s*] *to accomplish* [*the aim of the organization*] *by resort to violence.' Noto* v. *United States*, *post*, at p. 299. Thus the member for whom the organization is a vehicle for the advancement of legitimate aims and policies does not fall within the ban of the statute: he lacks the requisite specific intent 'to bring about the overthrow of the government as speedily as circumstances would permit.' Such a person may be foolish, deluded, or perhaps merely optimistic, but he is not by this statute made a criminal.'" (Emphasis supplied.)

And similarly, in the application of the statute at bar must there "be clear proof" of intention, and this proof becomes self-evident when a defendant expresses conduct, whether by "words or act," in the clear and concise language of the statute ("mutilate", "deface", "defile", "defy", "trample upon", or "cast contempt"). There is no need to narrow the statute by any rewriting of it since it is already in acceptable form.

Further, there is no "straining" from the natural intendment of the statute so as to render it unconstitutional for vagueness under the Fifth Amendment and Fourteenth Amendments, and thus encourage the danger of condoning the existence of a penal statute which, in its enforcement, is capable of broad and discriminatory application. (Compare

Yu Cong Eng v. *Trinidad*, 271 U.S. 500, 46 S. Ct. 619 [1926]; *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 83 S. Ct. 328 [1963]; *Aptheker* v. *Secretary of State*, 378 U.S. 500, 84 S. Ct 1659 [1964].)

No court or jury in trying cases involving alleged violations of New York's flag desecration statute will be required to indulge "in conclusive presumption[s] which testimony could not overthrow . . . and which all evidence considered together does not logically establish" so as to violate "the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime." (*Morissette* v. *United States*, 342 U.S. 246, 275, 72 S. Ct. 240, 256 [1952].)

Compare United States v. *Balint*, 258 U.S. 250, 42 S. Ct. 301 (1922), and, *United States* v. *Behrman*, 258 U.S. 280, 42 S. Ct. 303 (1922), wherein the offenses involved "belong to a category of another character, with very different antecedents and origins" (*Morissette, supra* at 252, 72 S. Ct. at 244.)

The "void-for-vagueness" doctrine should not become "a tool to be designedly used in the service of other ends" (Amsterdam, *The Void-For-Vagueness Doctrine in the Supreme Court*, 109 U. Pa. L. Rev. 67, note 98 at 87 [1960], if those ends will make subservient the well-being and security of our society. It is respectfully submitted that the appellant's act is particularly evil and should be so viewed by "the prevailing moral temper of [this] Court." (*Id.* at 87.)

Deference to the legislative intent requires that questions of "vagueness" and "overbroadness" be approached with cautious prudence. A statute not otherwise violative

of constitutional mandates does not become nugatory because of remote possibilities of misunderstanding. It is respectfully submitted that it has been herein demonstrated that a person of ordinary understanding will know when he is violating New York's flag desecration statute, and will easily recognize when someone else is.[18]

Finally, it is noteworthy that the statute limits its phohibition to encompass only speech and action occurring in public, so that private behavior toward the flag is not punishable.[19]

B

The appellant's conviction was predicated only upon his physical act of desecrating the flag of the United States, in public, and not for anything he verbally expressed at the time. Any statements attributed to him at the time were mere surplusage.

It becomes important to determine the ratiocination which motivated the police officer to make the arrest, the trial court to determine the appellant's guilt which was affirmed by an intermediate appellate court, and the ultimate pronouncement affirming the judgment of conviction by the State's highest court (*People* v. *Street*, 20 N.Y. 2d 231, 229 N.E. 2d 187 [1967], *supra*, appellant's Appendix 3a-10a.) For if this Court should in its wise judgment determine that the statute unconstitutionally impairs the precious right of free speech by including with its ambit "verbal expression," characterized by the language "words," in the statute, in

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[18] The appellees will endeavor to show that other objections to the statute advanced by the appellant are equally without merit (ARGUMENT D *infra*).

[19] See *State* v. *Peacock*, 25 A. 2d 491 (Sup. Jud. Ct.; Maine, 1942) (trial court's charge regarding "publicly" held erroneous).

contra-distinction to physical acts, also included in the statute, which the State of New York respectfully does not anticipate for reasons presented in ARGUMENT D *infra*, no legal justification would be present under the facts of this appeal which would warrant reversal of the conviction because of any claim "which requires a verdict to be set aside in cases where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground [had been] selected." (*Yates* v. *United States*, 354 U.S. 298, 312, 77 S. Ct. 1064, 1073 [1957]; see also, *Stromberg* v. *California*, 283 U.S. 359, 367-68, 51 S. Ct. 532, 535; *Williams* v. *North Carolina*, 317 U.S. 287, 291-92, 63 S. Ct. 207, 210 [1942]; *Cramer* v. *United States*, 325 U.S. 1, 36, note 45, 65 S. Ct. 918, 935 [1945].

The New York Court of Appeals was not called upon to determine whether the appellant's vocal language attributed to him was of a nature deserving of castigation. It is noteworthy that Chief Judge Fuld prefaces the opinion of a unanimous court below as follows:

> "We are called upon to decide whether the *deliberate act of burning an American flag in public* as a *'protest'* may be punished as a crime" (*People* v. *Street*, *supra* at 234, 229 N.E. 2d at 189; appellant's Appendix 4A; emphasis supplied.)

Thereafter, the opinion of the court below elaborates on the principle of "nonverbal expression," and refers to a number of cases wherein determinations were required to be made of conduct involving physical acts which resulted in "a troubling of the wonted calm of the whole community, or of a sizeable segment thereof."[20] (See *People* v. *Street*, supra at 234-36, 229 N.E. 2d 189-91; appellant's Appendix 5a-7a.) Emphasis is also placed on the "incendiary" na-

[20] Black, *Law Dictionary* (4th ed., 1957) 246.

ture of the act of "burn[ing] the flag in public" (*Id.* at 237, 229 N.E. 2d at 189-90; appellant's Appendix 9a). Finally, Chief Judge Fuld in explaining that the trial court did not render an inconsistent verdict at the time of the dismissal of the more general charge of disorderly conduct, refers to "the *act* in question [as being] specifically prohibited by [the subject] statute." (*Id.* at 237-38, 229 N.E. 2d at 191; appellant's Appendix 10a; emphasis supplied.)

It is, therefore, indisputable that the appellant's act of burning the flag, and not any statements made by him, was the basis for the determination by the New York Court of Appeals, after careful appraisal of the trial record, notwithstanding reference made by the court below that the appellant had told "the small crowd which collected that, 'If they let that happen to Meredith we don't need an American flag.' " (*Id.* at 234, 229 N.E. 2d at 189; appellant's Appendix 4a.) With due deference to Chief Judge Fuld and the court below, it would appear that no such statement was made to "the small crowd," but, rather, to the arresting officer himself when he approached the appellant to inquire of him if he burned the flag (17a). It is true that the arresting officer substantially set forth the aforementioned statement in his complaint charging Malicious Mischief (appellant's Appendix B), but as has been emphasized by the State, this statement served only as a guide to the trial court in determining appellant's intent.[21] At the trial, the officer's unequivocal testimony showed that the statement, "If they let that happen to Meredith we don't need an American flag," was made only to him, and in response to an inquiry (17a). This appears to be substantiated by the appellant's own testimony on direct examination when he stated that he

[21] See p. 39 *supra*.

was asked by the officer "if [he] set fire to the flag," and after replying in the affirmative, added, that he also told the officer, "If they do what they had [*sic*] to Meredith we don't need this flag" (24a). On continued direct examination, he acknowledged that he made the aforementioned statement to the police officer, and denied that he had spoken to anyone else (24a). Thus, there is nothing in the record to demonstrate whether others had heard this statement so that the basis for the charges of Disorderly Conduct and Malicious Mischief,[22] is, indisputably, for the physical act of burning the American flag in public, and in a contemptuous way.

The State of New York is further fortified in its position that the words expressed by the appellant were mere surplusage, and not any basis for his conviction whatever, by the following events disclosed in the record:

At the commencement of the trial, defense counsel informed the court that the United States and New York State Constitutions provided for protest in many forms, "whether it be by *burning* a flag, demonstration or picketing" (13a). (Emphasis supplied.) The following colloquy is significant:

> "Court: You say *burning* the flag is a form of demonstration?
> Mr. Goldstick: Yes". (13a). (Emphasis supplied.)
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> • • • • •
>
> Mr. Goldstick: Also, there is a Federal statute which provides for *burning* the flag . . . I refer Your Honor

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22. The flag desecration statute, *supra*, at the time of the occurrence was under Article 134 of the Penal Law of the State of New York, and this Article had for its sole purpose the prohibition of various forms of conduct, specified in detail, and denoted as "Malicious Mischief."

> . . . to the United States Code that a flag, when it is in such a condition that it is no longer a fitting emblem for display, should be *destroyed* in a dignified way, preferably by *burning* . . . New York State is without power to make a complaint and convict a man for the burning of an American flag (13a-14a). (Emphasis supplied.)
>
> Court: Motions denied. *The question here would be whether he burned it because it was in such poor condition that it should be burned,* or if it was an illegal demonstration" (14a). (Emphasis supplied.)

● When the police officer testified, he significantly stated that he had "asked the people in the crowd who *burned* the flag," and had asked the appellant "if he *burned* the flag" (17a) (Emphasis supplied.)

● The officer also testified that he "put out the fire and took the portions of the flag which were left [to] the station house" (17a; see also, 20a).[28] It again appears that the "act of burning," alone, prompted the arrest. From the condition of the flag, "[p]ortions of it was [*sic*] still burning" (19a), and the fact that the burning caused the appellant, by his own testimony, to drop it from his hand to the ground (23a), it would hardly be likely that the officer would have made the effort to extinguish the fire (17a) in order to salvage some physical evidence, if the arrest was truly predicated on the statements made by the appellant, and not on the burning itself. It would not be unreasonable to speculate that to the officer the act itself had greater impact than any of the statements made by the appellant. It will

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[28]See Appendix B-1, B-2 *infra* for copy of Property Clerk's Invoice, Police Department of the City of New York, indicating "[*f*]*ragments* of U.S. Flag" deposited by arresting officer, Patrolman James Copeland, on June 6, 1966, and "required as EVIDENCE." (Emphasis supplied.)

be recalled that the officer first came to the scene when he saw a fire burning and "thought some kids had started [it]" (15a). However, when he noticed that a flag was burning, he went into the crowd *in order to learn who was responsible for it* (15a-17a).

● The tenor of the appellant's cross examination was directed entirely to the act of the burning itself and not in one instance was any reference focused upon any statement made by him at the time he set fire to the flag (24a-25a). And at this juncture, defense counsel moved "to dismiss *on all the constitutional grounds previously made,*" as well as on pro forma grounds, and without further ado, following denial of motions, both sides rested, and judgment of guilt on the charge of Malicious Mischief was pronounced (25a).

● It is also to be noted that the appellant has at no time, either during trial, or in the course of the intermediate appeals to the Appellate Term of the Supreme Court of the State of New York, the New York Court of Appeals, as well as in his brief on file in this Court, relied on *Miranda* v. *Arizona,* 384 U.S. 436, 86 S. Ct. 1602 (1966), and taken issue with the manner in which the statement, "If they do what they had [*sic*] to Meredith we don't need this flag" (24a), was obtained. Since *Johnson* v. *New Jersey,* 384 U.S. 716, 86 S. Ct. 1772 (1966) has left to the state courts the determination as to the retroactive application of *Miranda, supra,* and the New York Court of Appeals, later, in *People* v. *McQueen,* 18 N Y 2d 337, 221 N.E. 2d 550 (1966), mandated the application of the landmark determination of *Miranda* in favor of those defendants whose trials have

taken place *on or after June 13, 1966,* it becomes especially significant that no objection was raised by appellant's counsel even though the trial was *on July 26, 1966.*

See also, *Duigan* v. *United States,* 274 U.S. 195, 200, 47 S. Ct. 566, 568 (1927); *Husty* v. *United States,* 282 U.S. 694, 701-02, 51 S. Ct. 240, 242 (1930); and, *Lawn* v. *United States,* 355 U.S. 339, note 16 at 362-63, 78 S. Ct. 311, 324 (1958), which hold that only in exceptional cases will this Court review questions not raised below. It is respectfully submitted that this is not such a case. (See Rules of this Court, 15[c], and 23[1][c].)

There was no evidence adduced that the statement, "If they let that happen to Meredith we don't need an American flag" (17a), was within the hearing of anyone, except the police officer, so as to form a basis for the charge of "Disorderly Conduct." As already pointed out, this statement was volunteered to the officer by the appellant in response to an inquiry (17a). Since that statement was directed to the officer, and not within the hearing of others so to cause consternation amongst anyone, it is not likely that a police officer in the proper performance of his duty would have formulated any charge of disorderly conduct *for the statement privately made to him.* (See *People* v. *La Sister,* 9 Misc. 2d 518, 170 N.Y.S. 2d 702 [Court of Special Sessions of the City of New York, Appellate Part, First Department, 1958]; compare *State* v. *Riley,* 265 S.W. 874 [Mo. Ct. App. 1924], wherein *loud* insults were directed at a police judge while on a public street "in the main part of town and a good many people gathered," and the court held "that there was enough evidence to justify a jury in finding that a breach of the peace was committed" [*Id.* at 874-75; Trimble J.].). Thus, the evidence grows stronger that the gravamen

of the charges was *solely* the physical act of burning the flag in public, defiantly, and *not* any oral statements made by the appellant.

Although it is true the police officer testified that when he first came on the scene he heard the appellant exclaim, "We don't need no damn flag" (17a); the single and casual reference to this statement at the trial, taken with the fact that no allusion was made to it in the complaint (appellant's Appendix B), is strong indication that the said officer had not considered it at all when the charges were subsequently lodged against the appellant. Of course, as did the other statement attributed to the appellant, it served to portray a determined attitude to desecrate the flag.

Albeit everything said by the appellant confirms the presence of intent to debase the flag, it is respectfully reiterated that notwithstanding any statements voiced by him at the time, there was *ample* evidence from other circumstances surrounding the act as will be shown in ARGUMENT C *infra*, which made distinct his pernicious attitude *without* the necessity of relying on superfluous statements made by him on a street, in Brooklyn, New York, the day he set fire to our Nation's flag. The defendant cannot find solace in any argument that he was tried and convicted of a violation of one offense when he was charged with a distinctly and substantially different offense. (Compare *De Jonge* v. *Oregon*, 299 U.S. 353, 362, 57 S. Ct. 255, 259, [1937]; *Cole* v. *Arkansas*, 333 U.S. 196, 200-01, 68 S. Ct. 514, 516-17 [1948]; *In re Oliver*, 333 U.S. 257, 273, 68 S. Ct. 499, 507-08 [1948]; see also, *Ginsberg* v. *New York*, 390 U.S. 629, 631-32, 88 S. Ct. 1274, 1276 [1968], note 1.). It was solely the act of burning the flag which led to the arrest and the sworn

complaint,[24] and for which the appellant was later tried and convicted.

Since it now appears that the trial court, as well as all counsel, were only concerned with the appellant's deliberate violation of the sanctity of the United States flag by publicly burning it in a disrespectful manner, the issue was clear and narrow, and no express findings were required. A court's judgment must be read and interpreted in the light of what was before it.

See *Pen-Ken Gas & Oil Corp.* v. *Warfield Natural Gas Co.*, 137 F. 2d 871, 885 (6th Cir. 1943), *cert. denied*, 320 U.S. 800, 64 S. Ct. 431 (1944).

See also, 49 C.J.S. 862-69, sec. 436 (Judgments: Construction in General).

In passing, it must be stressed that none of the statements made by the appellant, which the State of New York claims to be merely extraneous because the acts, alone, were sufficient to, and did, impel the finding of guilt, were admitted into the record as the result of "prosecutorial comments," so as to require serious consideration of harmless-error statutes or rules (28 U.S.C.A., Sec. 2111).[25] (Compare

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[24] A study of the sworn complaint (appellant's Appendix B), reveals that its substance, particularly as set forth in the first paragraph, revolves about the burning of the flag. The significance of that is in no wise diminished even though the second paragraph, *still referring to the act of burning*, adverts to the extraneous statement made by the appellant. It is customary for a police officer to include in his sworn complaint some or all of the inculpatory statements or admissions made by a defendant at the time of arrest.

[25] 28 U.S.C.A. § 2111 provides:

"On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

Chapman v. *California*, 386 U.S. 824, 87 S. Ct. 824 [1967].) It was the appellant *himself* who testified that when he heard the news flash that James Meredith had been shot, he said, "They didn't protect him" (22a), and also confirmed the arresting officer's testimony by saying, "If they do what they had [*sic*] to Meredith we don't need this flag" (24a). Thus, the factual situation of the trial is remote from that which was condemned in *Chapman, supra*, and not violative of the Fifth and Fourteenth Amendments.

In any event, the trial of the instant case took place before a court without a jury. There is a strong presumption that where a court sits without a jury, it acts only on the basis of proper and legal evidence. (*Clark* v. *United States*, 61 F. 2d 695 [8th Cir. 1932], *aff'd*, 289 U.S. 1, 53 S. Ct. 465 [1933].) An experienced judge "is supposed to be able to 'sift the wheat from the chaff'." (*Ward* v. *State*, 105 S. E. 373 [1920].)

It must also be noted that the record shows that experienced counsel, who was both alert and persistent in protecting his client throughout the entire trial, did not attach any significance in the least to the statements ascribed to the appellant. Otherwise, a more resolute position would have been taken by counsel insofar as the effect the prohibition of verbal language concerning the flag would have in regard to constitutional guarantees.

C.

The appellant's singular behavior on a public street at the time of the burning made manifest, to all those who observed him, his purpose to desecrate the flag of the United States of America, thereby endangering public order and tranquility, as well as degrading a standard representative of American ideals.

The appellant's statements that he went "to a bureau drawer and *carefully* took out an old 48-star American flag," and after taking it to the intersection of Lafayette Avenue and St. James Place "first *carefully* laid a piece of paper on the sidewalk," and after setting fire to the flag, holding it as long as he could, then placing it *carefully* on the piece of paper so that it would not touch the sidewalk (Brief for Appellant, p. 3; emphasis supplied), are belied by the record of the case. According to the police officer the flag was not on a newspaper (21a), and although the appellant did testify that he "laid a piece of newspaper on the ground" (23a), there is no statement by him that he placed the flag on the paper prior to setting fire to the former. Rather, his testimony was that when the blazing flag began to burn his hand, *he let it drop,* without indicating whether or not it found its resting place on the newspaper (23a).

It is difficult to comprehend what beneficial purpose would have been served by placing the burning flag on a piece of paper, which itself would be quickly consumed by the flames, and thus not advance the suggested purpose for it, which the appellant would wish us to believe, namely, "so that [the flag] would not touch the sidewalk" should he drop the burning flag after holding it "as long as he could" (Brief for Appellant, p. 3). It is more credible that if any paper were present, its purpose would have been to facilitate the

burning of the flag. There is some credence to this view when it is recalled that the police officer had seen the appellant on the *northwest* corner of St. James Place and Lafayette Avenue, in Brooklyn, New York, while the flag was burning on the *northeast* corner of that intersection (15a, 17a, 18a, 19a). It would thus seem that the appellant was not intent in engaging in a dignified flag-burning ceremony as provided for by law,[26] for if he had, he would have remained at the place where the flag was burning, and until it was entirely consumed, without going to another location where he was seen motioning with his hands (17a), apparently in an *agitated* condition. It is inescapable that he had quickly set fire to the flag in an undignified manner, while vexed, and that his assertion of having paper at the time, for the purpose it is claimed by him (Brief for Appellant, p. 3) was but a feeble attempt at exculpation, and that any paper, if it did exist, was intended to serve as additional fuel for the burning.

All of the foregoing behavior, without more, unequivocally spelled out to his audience, the appellant's iniquitous design to desecrate the flag, and there was no need, it is again emphasized, for any verbal language on his part to fortify such a conclusion. The finding of guilt by the trial court crystallized the appellant's resolve by attaching credence to the police officers' testimony with regard to material facts, while necessarily negating any alleged good intent on the part of the appellant. A claim of guilelessness does not suit well one with an unworthy motive. It is this sort of

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26 See 36 U.S.C.A., Sec. 176(j): "The flag, when it is in such condition that it is no longer a fitting emblem for display, should be destroyed in a dignified way, preferably by burning. June 22, 1942, c. 435, sec. 4, 56 Stat. 379; Dec. 22, 1942, c. 806, sec. 4, 56 Stat. 1076." This subdivision is prefaced by the language, "No disrespect should be shown to the flag of the United States of America. . . ."

action which clearly spells out intent. In *Cramer* v. *United States*, 325 U.S. 1, 65 S. Ct. 918 (1945), *supra*, Mr. Justice Jackson, in referring to a defendant's deportment, clearly stated:

> "Since intent must be inferred from conduct of some sort, we think it permissible to draw usual reasonable inferences as to intent from overt acts. The law . . . assumes every man to intend the natural consequences which one standing in his circumstances and possessing his knowledge would reasonably expect to result from his acts. (*Id.* at 31, 65 S. Ct. at 933.)
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> "Environment illuminates the meaning of acts, as context does that of words. What a man is up to may clear from considering his bare acts by themselves; often it is made clear when we know the reciprocity and consequence of his acts with those of others, the interchange between him and another, the give and take of the situation." (*Id.* at 33, 65 S. Ct. at 934.)

In fine, the disparity in the testimony regarding important facts, i.e., where the appellant was standing at the time the flag was burning, the presence of a piece of newspaper, the "concern" with which the flag was being handled, the decision to burn it then because it was made obsolete by its 48 stars, and at a time when he was upset by the shooting of Meredith, notwithstanding the fact that he had decided to burn the old flag "[a]fter he had purchased the new one" a while back (24a, 25a), was material in determining culpability, and served to characterize the appellant's testimony as unworthy of belief.

In *The Santissima Trinidad* and *The St. Ander*, 20 U.S. 280, 337, 7 Wheaton 283 (1822), Mr. Justice Story had this to say:

> "If the circumstances respecting which the testimony is discordant be immaterial, and of such a nature, that mistakes may easily exist, and be accounted for in a manner consistent with good faith and probability, there is much reason for indulging the belief that the discrepancies arise from the infirmity of the human mind, rather than from deliberate error. But where the party speaks to a fact in respect to which he cannot be presumed liable to mistake, as in relation to the country of his birth, or his being in a vessel on a particular voyage, or living in a particular place, if the fact turn out otherwise, it is extremely difficult to exempt him from the charge of deliberate falsehood; and courts of justice, under such circumstances are bound upon principles of law, and morality and justice, to apply the maxim falsus in uno, falsus in omnibus. What ground of judicial belief can there be left, when the party has shown such gross insensibility to the difference between right and wrong, between truth and falsehood?"

Thus, the *public* behavior of the appellant, as aforesaid, did at that juncture attach a *fait accompli* to the crime so that the finding of guilt is no longer left in doubt. But if there be further proof required to make more secure the appellant's guilt, the State of New York need only point out the angry statements made by him at the time, without yielding one iota from its position taken that he was convicted for the *act* of burning only, as was stressed in ARGUMENT B. *supra*.

And when we consider other facts *before* he went into the street, and burned the flag which had once draped the casket of his wife's stepfather,[27] about 20 years before

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[27] The appellant's counsel alludes to the stepfather's burial as a war veteran (Brief for Appellant, p. 3), although the record is devoid of such proof.

Appellant's counsel also gratuitously stated that the stepfather "had been revered by both appellant and his wife (Brief for Appellant, p. 3), although that is reasonably inferable from the testimony (23a).

(23a) and which flag had obviously once had great meaning for him and his family, it appears incredible that the appellant should have entertained the idea of disposing of a precious keepsake in the first place, even if in a "dignified manner!" Having heard the news flash about the shooting of Meredith, and by his own testimony stating while still at home, "[t]hey didn't protect him." (22a), the appellant was immediately catapulted into "hysterical" conduct which was fraught with contempt for the flag of the United States of America. And more meaningful does his contempt become when we reflect that he served in the military service of the United States, for which he was decorated (22a), and for whom the flag should have had great significance as it evidently did by the retention of it for 20 years, and the purchasing of a new one for display on holidays (24a). It would not be uncharitable to characterize the appellant's conduct on the day of the occurrence as not only one of contempt, but of arrogance and rebellion as well. The fact that the flag had been neatly folded does not redound to the appellant's benefit. The evidence does not disclose whether the flag was folded for the first time after the news flash was heard, or whether it had already been folded before it was removed from the dresser drawer (22a-23a). The testimony is susceptible of the latter view. In any event, the evidence is probatively weighted so as to remove any doubt whatever regarding the appellant's intention to violate the statute.

Under such circumstances the trial court was warranted in applying the well-established principle of law that the trier of the facts is justified in accepting that portion of the testimony of a witness which is inculpatory while rejecting that which is exculpatory.

Compare *Henze* v. *State*, 154 Md. 332, 347, 140 A. 218, 225 (1925).

On oral argument before the New York Court of Appeals, the appellant's counsel disavowed a prior contention that the flag was obsolete because it contained but 48 stars.[28] There was indeed no evidence forthcoming that because of its condition "it [was] no longer a fitting emblem for display," and was being "destroyed in a dignified way, preferably by burning" (36 U.S.C.A., Sec. 176 [j], *supra*). The proof to the contrary is unassailable.

That the appellant retained a 50-star flag (23a), and had planned to burn the 48-star flag, although he claims to have selected such an occasion to do so, has no effect whatever in weakening his accountability for the venomous act which, in those provoking and tarnishing moments, reduced the flag of the United States almost to complete ashes. That a suspended sentence was imposed was attributed to the presence of "mitigating circumstances." (See *People* v. *Street*, 20 N.Y. 2d 231 [1967], *supra* at 237, 229 N.E. 2d at 191; appellant's Appendix 10a). It is also important to reiterate that although the appellant was charged with "Disorderly Conduct and . . . Malicious Mischief" (14a) the New York Court of Appeals acknowledged that the appellant was convicted in accordance with the statute which specifically prohibited his act, rather than under "the more general

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[28] See *People* v. *Street*, 20 N.Y. 2d 231 (1967), *supra*, note 4 at 237; 229 N.E. 2d at 191; appellant's Appendix 9a.

The statute before this Court in referring to "the colors, the stars, and the stripes," adverts to "any number of either thereof," and although the flag was faded (23a), the statute also describes such a standard as being "represented on any substance, and purporting to be "the flag . . . . of the United States of America." At the time the appellant himself referred to the flag as "[t]he American flag" (22a).

charge of disorderly conduct", so that there was no "inconsistent verdict." (*Ibid.*)

D.

The statute is in all respects a proper exercise of the state's police power, and does not unconstitutionally abridge the fundamental right of expression. The appellant's act of burning the flag, in the manner employed, is not symbolic speech and hence is not entitled to be protected by the First Amendment.

The appellees are mindful of the fact that a State may not unreasonably make any law abridging freedom or liberty of speech (First and Fourteenth Amendments to the United States Constitution). (See *Gitlow* v. *New York*, 268 U.S. 652, 666, 45 S. Ct. 625, 630 [1924]; *Whitney* v. *California*, 274 U.S. 357, 373, 47 S. Ct. 641, 647 [1927]; *Grosjean* v. *American Press Co.*, 297 U.S. 233, 243, 244, 56 S. Ct. 444, 446 [1936].) The right to "speak freely" is the foundation of democratic government, and as expounded by Mr. Justice Holmes in *United States* v. *Schwimmer*, 279 U.S. 644, 654-55, 49 S. Ct. 448, 451 (1929) (dissenting opinion), "[I]f there is any principle of the [U.S.] Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought we hate." Yet it is significant that until about 1922, the United States Supreme Court accepted the view that the Fourteenth Amendment did not make the First Amendment binding on the States. (See *Prudential Insurance Co.* v. *Cheek*, 259 U.S. 530, 543, 42 S. Ct. 516, 522 [1922].) In 1925, the Court in *Gitlow* v. *New York*, *supra* at 666, 45 S. Ct. at 630, "ventured the tentative assumption that the 'freedom' of speech

protected by the First Amendment was included in the 'liberty' which the Fourteenth Amendment required the states to respect." (See DUMBAULD, BILL OF RIGHTS AND WHAT IT MEANS TODAY 133 [1957].) Eventually, through the process of "incorporation" or "absorption," all of the First Amendment liberties were made binding against the States. In the area of free speech, the case of *West Virginia State Board of Education* v. *Barnett*, 319 U.S. 624, 63 S. Ct. 1178, 1183 (1943), *supra*, is particularly noteworthy as showing just when a State may not be permitted to censor or suppress expression of opinion. Thus, although a flag salute was involved, it was this Court's majority view that "[t]o sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind." (*Id.* at 634, 63 S. Ct. at 1183.)

Yet, conceding the sacrosanct nature of First Amendment freedoms, particularly the one concerned with free speech, it is respectfully submitted that a State may, in the exercise of its police power, place reasonable regulations and restrictions upon this constitutional guarantee in the interest of public order. (See *Davis* v. *Massachusetts*, 167 U.S. 43, 47, 17 S. Ct. 731, 733 [1897]; *Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418, 439, 31 S. Ct. 492, 497 [1911]; *Schenck* v. *United States*, 249 U.S. 47, 52, 39 S. Ct. 247, 249 [1919]; *Gitlow* v. *New York*, 268 U.S. 652, *supra* at 667, 45 S. Ct. at 630; *Whitney* v. *California*, 274 U.S. 357, 371, 47 S. Ct. 646, 647 [1927], *supra*.)

In order to sustain the position of the appellees herein, it becomes vital to point out in some detail the philosophy underlying the need for a statute such as sec. 1425, subd. 16, para. d, of the Penal Law of the State of New York, *supra*.

In *People ex rel. McPike* v. *Van De Carr*, 91 App. Div. 20, 26 (1st Dept. 1904), *aff'd*, 178 N.Y. 425 (1904), Mr. Justice Patterson, in emphasizing the need for the statute, stated as follows:

> "It was competent for the Legislature to make it a misdemeanor to publicly mutilate, deface, defy, defile, trample upon or cast contempt, either by word or act, upon the National or State flag, and mutilation of the flag may mean the printing of an advertisement on the ensign itself. Such legislation is within the police power of the State, for its relates to the preservation of the peace. It tends to prevent the commission of acts which would arouse the indignation of the public and lead to the infliction of summary chastisement upon an offender; for *it is not a mere rhetorical phrase to say that the people have constituted themselves the guardians and protectors of the National flag.* The State has taken upon itself the punishment of those whose acts would excite the people to violence, and legislation to accomplish that result relates directly to the preservation of the public peace and the good order of society." (Emphasis supplied.)

It is significant that Mr. Justice Patterson's language was later unanimously approved by the Court of Appeals of the State of New York (178 N.Y. 425, *supra*), although the court also affirmed a finding that another portion of the statute, not pertinent herein, was constitutionally defective since it was improperly applied, also, to articles manufactured and in existence before the section was enacted, thereby destroying existing property rights.

Nor has the Supreme Court of the United States failed to voice its feeling about the "object of national piety"

(*Durable Toy & Novelty Corporation* v. *J. Chein & Co.*, 133 F. 2d 853, 855 [2d Cir. 1943] (Learned Hand, J.). In *Halter* v. *Nebraska*, 205 U. S. 34, 27 S. Ct. 419 (1906) Mr. Justice Harlan, in passing upon the constitutionality of a statute which proscribed the use of the flag for advertising purposes, stated:

> "From the earliest periods in the history of the human race, banners, standards and ensigns have been adopted as symbols of the power and history of the peoples who bore them. It is not then, remarkable that the American people, acting through the legislative branch of the Government, early in their history, prescribed a flag as symbolical of the existence and sovereignty of the Nation. Indeed, it would have been extraordinary if the Government had started this country upon its marvelous career without giving it a flag to be recognized as the emblem of the American Republic. For that flag every true American has not simply an appreciation, but a deep affection. No American, nor any foreign-born person who enjoys the privileges of American citizenship, ever looks upon it without taking pride in the fact that he lives under this free Government. Hence, it has often occurred that insults to a flag have been the cause of war, and indignities put upon it, in the presence of those who revere it, have often been resented and sometimes punished on the spot. (*Id.* at 41, 27 S. Ct. at 421.)
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> "[W]e are of opinion that those who enacted the statute knew, what is known of all, that to every true American the flag is the symbol of the Nation's power, the emblem of freedom in its truest, best sense. It is not extravagant to say that to all lovers of the country it signifies government resting on the consent of the governed; liberty regulated by law; the protection of the weak against the strong; se-

curity against the exercise of arbitrary power; and absolute safety for free institutions against foreign aggression. As the statute in question evidently had its origin in a purpose to cultivate a feeling of patriotism among the people of Nebraska, we are unwilling to adjudge that in legislation for that purpose the State erred in duty or has infringed the constitutional right of anyone. On the contrary, it may reasonably be affirmed that a duty rests upon each State in every legal way to encourage its people to love the Union with which the State is indissolubly connected." (*Id.* at 43, 27 S. Ct. at 422.)

Although *Halter, supra,* was concerned with the use of a representation of the flag in an advertising scheme, the case is nevertheless pertinent because the statute therein involved contained language substantially analogous to the statute now before this Court. That case becomes even stronger authority when we realize that the flag had been used for advertising purposes, which is less of a threat to public order than the use to which the present appellant applied it.

It is also significant that many States have subscribed to the view that the flag of the United States merits respect as a symbol of Americanism, and "an object of patriotic adoration" (*Halter* v. *State,* 74 Neb. 757, 105 N.W. 298, 300 [1905].) Accordingly, the Legislatures of those States have promulgated legislation to protect its meaning.[29]

In *People* v. *Picking,* Misc. , 23 N.Y.S. 2d 148, 149 (N.Y. City Mag. Ct. 1940), *aff'd,* 263 App. Div. 366 (1st Dept. 1942), *aff'd,* 288 N. Y. 644 (1942), *cert. denied,* 317 U.S. 632 (1942), *supra,* the trial court referred to the instant

[29] See *Halter* v. *Nebraska,* 205 U.S. 34, 39-40, 27 S. Ct. at 421, *supra.* Other states have since followed suit.

statute as a "salutary one." The New York Court of Appeals affirmed the judgment of conviction and upheld the constitutionality of the statute without opinion. The conduct condemned by the trial court had been one which involved the placing of an advertisement on a car in close proximity to the flag of the United States.

Section 1425, subdivision 16, of the Penal Law, *supra,* has been the subject of interpretations through the years. In 1934, Hon. John J. Bennett, Jr., as Attorney General of the State of New York, advanced the opinion that the "intent of the legislature in enacting Section 1425 was to insure that the use of the Flag of the United States, or of the representation thereof be appropriate and respectful." (See 51 N.Y. State Dept. Rep. 240 [1934].) "The statute is comprehensively designed to prevent desecretion of the Flag . . . of the . . . United States." (See 1941 N.Y. Att'y Gen. Rep. 465)

At the time of the trial, appellant's counsel argued that the statute was inconsistent with 36 U.S.C.A., Section 176 (j), *supra,* note 26, and, thus, violative of the Supremacy Clause of the United States Constitution (14a). Such an argument is inappropriate.

There is no provision in the federal law which prohibits a State from enacting and enforcing legislation designed to prevent disrespect to a symbol of Americanism.[30] The

[30] In fact, the statute formulated as the result of Hearings before Subcommittee No. 4 of the Committee of the Judiciary House of Representatives, 90th Congress, 1st Session, 1967, Report No. 350, *supra* at note 11, wisely dispels any doubt in this regard by expressly reserving to the "State, territory, possession of the Commonwealth of Puerto Rico . . . jurisdiction over any offense over which it would have jurisdiction in the absence of this section" (H.R. 10480, chapter 33, title 18, U.S.C.A., Sec. 700 subsec. (c).

American flag is as much a part of a State as it is of the Nation. Any contempt cast on it also affronts the dignity and well-being of a State. (*Halter* v. *Nebraska, supra.*)

That a State has the power to so legislate was succinctly expressed by Mr. Justice Harlan in *Halter* v. *Nebraska,* 205 U.S. 34, 27 S. Ct. 419, *supra,* as follows:

> "In our consideration of the questions presented we must not overlook certain principles of constitutional construction, long ago established and steadily adhered to, which preclude a judicial tribunal from holding a legislative enactment, Federal or state, unconstitutional and void, unless it be manifestly so. Another vital principle is that, except as restrained by its own fundamental law, or by the Supreme Law of the Land, a State possesses all legislative power consistent with a republican form of government; therefore, each State, when not thus restrained, and so far as this court is concerned, may, by legislation, provide not only for the health, morals and safety of its people, but for the common good, as involved in the well-being, peace, happiness and prosperity of the people." (*Id.* at 40-41, 27 S. Ct. at 421.)
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> "It may be said that, as the flag is an emblem of National sovereignty, it was for Congress alone, by appropriate legislation, to prohibit its use for illegitimate purposes. We cannot yield to this view. If Congress has not chosen to legislate on this subject, and if an enactment by it would supersede state laws of like character, it does not follow that, in the absence of National legislation, the State is without power to act. There are matters which, by legislation, may be brought within the exclusive control of the General Government, but over which, in the absence of National legislation, the State may exert some control in the interest of its own people. . . . [A] State may exert its power to

strengthen the bonds of the Union and therefore, to that end, may encourage patriotism and love of country among its people. When by its legislation, the State encourages a feeling of patriotism towards the Nation, it necessarily encourages a like feeling towards the State. One who loves the Union will love the State in which he resides, and love both of the common country and of the State will diminish in proportion as respect for the flag is weakened. Therefore a State will be wanting in care for the well-being of its people if it ignores the fact that they regard the flag as a symbol of their country's power and prestige, and will be impatient if any open disrespect is shown towards it." (*Id.* at 41-42, 27 S. Ct. at 421-22.)

In *Ex parte Starr*, 263 F. 145, 146 (Dist. Ct., Mont. 1920), it was held that a state statute was not pre-empted by Federal legislation which "neither pardons the offense nor draws it within Federal jurisdiction."

It is noteworthy that a statute similar to the instant one was passed in the District of Columbia in 1917 (4 U.S.C.A., Sec. 3).

See 36A, C.J.S., 746, sec. 2, (Flags: Laws Relating to United States or State Flags).

In fine, both the New York and federal statutes do not conflict with each other since both are designed to prohibit that conduct for which the appellant herein was tried and found guilty.

It is the appellant's contention that the statute involved, designed to prevent breaches of the peace which would be imminent if the flag were desecrated, as well as to protect a respected symbol, estops persons from the free transmission of ideas. According to the appellant the act of flag burning, when intended solely as an act of communication of ideas, is permissible since no secondary effects, or "by-products",

of the act will follow that will frustrate a governmental interest. And in support of such contention, the appellant relies upon such cases as *Stromberg* v. *California*, 283 U.S. 359, 51 S. Ct. 532 (1931), *supra; Thornhill* v. *California*, 310 U.S. 88, 60 S. Ct. 736 (1940); *Garner* v. *Louisiana*, 368 U.S. 157, 82 S. Ct. 248 (1961); *Edwards* v. *South Carolina*, 372 U.S. 229, 83 S. Ct. 680 (1963); *Brown* v. *Louisiana*, 383 U.S. 131, 86 S. Ct. 719 (1966). Compare *Walker* v. *City of Birmingham*, 388 U.S. 307, 87 S. Ct. 1824 (1967).

In none of the foregoing cases were any of the acts evinced therein other than those of "peaceful" or "conciliatory" conduct, nor beset with agitation as in the instant case. It was that which prompted this Court to recognize those acts *as forms of symbolic expression* deserving of protection under the First Amendment to the United States Constitution because the arrests had foreclosed peaceful non-verbal means by which persons could make themselves heard.

The appellant's behavior in burning a symbol of Americanism in a public place, while simultaneously spewing words of contempt, was not an act of "peaceful" expression entitled to constitutional protection. This act of "violence,"[31] regardless of its degree, cannot be protected even though the appellant verbally expressed views such as, "We don't need no damn flag," and, "If they let that happen to Meredith we don't need an American flag" (17a). (Compare *Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490, 498, 502, 69 S. Ct. 684, 688-89, 690-91 [1949], wherein it was held that violence or other unlawful conduct will not

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[31] "Violence" is defined as follows: 1a: exertion of any physical force so as to *injure or abuse* . . . , 2: injury in the form of revoking, *repudiation* . . . or *irrevance to a thing* . . . , 3b: *vehement feeling or expression*. . . ." (Webster's New Int. Dictionary [3rd ed. 1964] [emphasis supplied].)

be protected "merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.")

Accord, Cox v. *Louisiana,* 379 U.S. 536, 555, 85 S. Ct. 453, 464-65 (1965); Same parties, 379 U.S. 559, 564, 85 S. Ct. 453, 480-81 (1965).

The appellant's act of burning the flag, because of its undermining effects upon society, is not entitled to be dignified by affixing to it the appellation of "symbolic speech." No act can be considered "symbolic speech" if it interferes with the legitimate functions of government, which in this case are to preserve peace, good order and morals, as well as a symbol of our existence as a democratic society having a great history, and a still greater future. Yet, even *if* we were inclined to extend symbolic communication beyond its true and acceptable meaning, as gleaned from the foregoing cases relied upon by the appellant, it is respectfully reiterated, nonetheless, that from the very nature of the appellant's act of publicly desecrating the flag by burning, attaching to it the protection afforded by the First Amendment to the United States Constitution would be unwarranted. Symbolic speech has never been given the same significance as the written or spoken word. As stated by Mr. Justice Goldberg in *Cox* v. *Louisiana,* 379 U.S. 536, 555, 85 S. Ct. 453, 464-65 (1965), *supra*:

> "We emphatically reject the notion . . . that the First and Fourteenth Amendments afford the *same kind of freedom* to those who would communicate ideas by conduct such as patrolling, marching and picketing on streets and highways, as these amendments afford to those who communicate ideas by pure speech." (Emphasis supplied.)

In a more recent case, this Court, in a majority holding, rejected the argument that "people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please." (See *Adderley* v. *Florida*, 385 U.S. 39, 47-48, 87 S. Ct. 242, 247 [1966] [Black, J.].)

Thus, Mr. Justice Black has also drawn a line between pure speech and conduct.

Appellant's diaphanous attempt to attribute symbolic meaning to his act because "[a]ll communication is basically that," and "[l]anguage is nothing more than a higher developed set of abstract symbols (Brief for Appellant, p. 21), must be rejected, even though reliance is predicated upon such eminent authority as the Encyclopedia Britannica. The act of the appellant is no different than hurling a stone through the window of the White House, painting the latter black, while trespassing, or setting fire to the National Archives. Certainly one would not be permitted to communicate with another by sending smoke signals in a busy metropolis to the annoyance of its inhabitants. Appellant likens the burning of the flag to the burning of an effigy of the President. (Brief for Appellant, p. 25). Burning an effigy of a President, bad as it is, would not take on the same meaning as burning our Nation's flag. The former act will ordinarily be construed with a political connotation, while the other is not likely to since it is an offense directed at the *foundation* of government itself. The boundaries of symbolic speech must be fixed where the dangers to society threaten to erupt. At that point the conduct ceases to have permissible communicative effect.

See also, *People* v. *Stover*, 12 NY 2d 462, 191 N.E. 2d 272 (1963), *appeal dismissed*, 375 U.S. 42 (1963) (symbolic ex-

pression "offending sensibilities"); *People* v. *Martin*, 15 NY 2d 933, 207 N.E. 2d 197 (1965), *cert. denied*, 382 U.S. 828 (1965) (sit-in); *People* v. *Penn*, 16 NY 2d 581 (1965), *cert. denied*, 383 U.S. 969 (1966) (picketing).

The appellant emphasizes the importance of evolving newer and more dramatic forms of communication, so that greater impact can be gained "upon . . . persons in the immediate vicinity," and thus "unlock the key to the mass media as well." (Brief for Appellant, p. 31). The State of New York does not deny that demonstrations, for example, are often beneficial in winning justice for people, but it is the type of conduct conducive to the proper transmission of ideas as found in *Stromberg* v. *California*, 283 U.S. 359, 51 S. Ct. 532, *supra*; *Thornhill* v. *California*, 310 U.S. 88, 60 S. Ct. 736 (1940), *supra*; *Garner* v. *Louisiana*, 368 U.S. 157, 82 S. Ct. 248 (1961); *Edwards* v. *South Carolina*, 372 U.S. 229, 83 S. Ct. 680 (1963), *supra*; *Brown* v. *Louisiana*, 383 U.S. 131, 86 S. Ct. 719 (1966), *supra*, which has greater impact upon encouraging reforms that will eradicate the unfortunate evils existing in our society. Indeed, eloquent and articulate spokesmen are attracted to the causes of socially and economically-disadvantaged persons, or for that matter to any other question espoused, when predicated upon rational and truly meaningful conduct. In the instant case, the appellant's act of burning the United States flag to express his resentment for the unfortunate shooting of James H. Meredith, the latter deed not having been committed by the Nation, but by private persons whose censurable proclivities no amount of paternalistic legislation or reform could ever alter, is in no wise related to those acts set forth in the cases referred to directly above-cited. There, the conduct was directed, in the

main, at *governmental operations,* local state or federal, and not the "private" act which resulted in injury to a respected civil rights advocate.

In addition, the act of the appellant did not, on its face, spell out the particular problem for which he was seeking ameliorative changes. But not for some chance utterance, his conduct appeared to have no sound basis, and took on the garb of rebellion. In each of the aforementioned cases, the action indicated clearly the reason for the behavior displayed, nor was any act done which had the tendency to obliterate *all* respect for the Nation. The appellant's act was as if an anarchist had hurled a bomb on that which he wished to destroy, not improve. The moment the appellant set fire to the flag, there was no intention on his part to bring on needed reform. He had set fire to the Nation itself. What was intended as civil disobedience was perverted into an attack on a statute which actually did not offend him.

Dissent regarding particular policies of a Nation is one thing, but desecration of the American flag is a repudiation of everything, including the basic political spirit of the Country, and the Constitution which speaks for it and its inhabitants. The former mode of dissent is invaluable as an aid in the Government's self-correction; the latter, however, leaves naught to remedy, for not being dissent in the accepted sense, it becomes a call for destruction. Flag desecration, whether by "words or act," is dangerously disquieting, and removes, by its infantileness and irrationality, the perpetrator from the scene of effective discussion, and leaves instead, the lit fuse of peril to public safety and the eventual, but almost certain, decadence of the Nation's spirit.

It would appear that the appellant seeks to rely solely upon the "clear-and-present-danger" doctrine by para-

phrasing its basic principle in its earliest version," that [m]ore than a mere possibility is required" when related to the suppression of speech "merely because it *might* lead to a substantive evil." (Brief for Appellant, p. 27; emphasis in original.) Notwithstanding this, however, it is the State's considered submission that other tests are equally applicable to the instant appeal for reasons hereinafter set forth.

The classic "clear-and-present-danger" test is succinctly set forth in *Schenck* v. *United States*, 249 U.S. 47, *supra* at 52, 39 S. Ct. at 249 (1919),[32] when Mr. Justice Holmes expressed the view that "'[t]he question in every case is whether the words used are used in such circumstances and and are of such a nature to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."

However, it now appears that in recent Supreme Court decisions, particularly in those matters involving narrowly drawn statutes which on their face regulate conduct, rather than the communication of ideas, as in *Schenck*, the "clear-and-present-danger" test has been replaced with a "balancing-of-interests" test. Prior to then, and according to Mr. Justice Brandeis, who, as co-architect, amplified the "clear-and-present-danger" test, "no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to

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[32] *Schenck* involved conduct as a means by which to accomplish sedition in time of war, and in violation of the Espionage Act of June 15, 1917. *Accord. Frohwerk* v. *United States*, 249 U.S. 204, 39 S. Ct. 249 (1919); *Debs* v. *United States*, 249 U.S. 211, 39 S. Ct. 252 (1919).

be applied is more speech, not enforced silence. Only an emergency can justify repression." (See *Whitney* v. *California*, 274 U.S. 357, 377, 47 S. Ct. 641, 649 [1927], *supra*, [concurring opinion].) Yet, despite the views of Mr. Justices Holmes and Brandeis, it thereafter became necessary to apply a "balancing-of-interests" test by which "conduct [was] regulated in the interest of public order" so that it became necessary to allow the operation of a regulation albeit there was an "indirect, conditional, partial abridgement of speech." (See *American Communications Assn* v. *Douds*, 339 U.S. 382, 399, 70 S. Ct. 674, 684 [1950] *supra*.)[33] Now the stage was set for the courts to decide which of two conflicting interests dictated the greater need for protection. The courts in applying this new formula would be required in each case to "balance the individual and social interest in freedom of expression against the social interest sought by the regulation which restricts expression." (See Emerson, *Towards a General Theory of the First Amendment*, 72 Yale L.J. 877, 912 [1963].

Thus, in *Dennis* v. *United States*, 341 U.S. 494, 510, 71 S. Ct. 857, 868 (1951), *affirming* 183 F. 2d 201, 212 (2d Cir. 1950), *supra*, four of the six members of the Court who joined in upholding the conviction, accepted Chief Judge Learned Hand restatement of the "clear-and-present-danger" test,[34] thereby diluting it into a balancing test.

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[33] It was in *Douds* that Mr. Chief Justice Vinson first clearly enunciated the "balancing-of-interests" test.

[34] The restatement by Judge Hand is inherent in the language: "In each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger. We have purposely substituted 'improbability' for 'remoteness,' because that must be the right interpretation. Given the same probability, *it would be wholly irrational to condone future evils which we should prevent if they were immediate;* that can be reconciled only by an indifference to those who come after us." (183 F. 2d at 212, emphasis supplied.)

That the "balancing" test has continued to maintain its effectiveness is evident from the holdings in *N.A.A.C.P.* v. *Alabama,* 357 U.S. 449, 461, 78 S. Ct. 1163, 1171 (1958); *Barenblatt* v. *United States,* 360 U.S. 109, 126-27, 79 S. Ct. 1081, 1093 (1959); *Konigsberg* v. *State Bar,* 366 U.S. 36, 49-51, 81 S. Ct. 997, 1006-07 (1961); *United States* v. *Aarons,* 310 F. 2d 341, 345 (2d Cir. 1962),[35] and *United States* v. *Miller,* 367 F. 2d 72 (2d Cir. 1966), *cert. denied,* 386 U.S. 911 (1967).

The "balancing-of-interests" test denied that any speech has an absolute right of protection under the First Amendment. That free speech is not absolute was also recognized by Mr. Justice Brandeis in *Whitney* v. *California,* 274 U.S. 357, 373, 47 S. Ct. 641, 647 (1927), *supra,* (concurring opinion).[36]

Yet, even the "clear-and-present-danger" test as restated by Judge Hand in *United States* v. *Dennis* (2d Cir. 1950), 183 F. 2d 201, 212, *supra,* has not entirely lost its vitality for as one writer has observed:

> "Its essential features have been preserved, but adapted to the peculiar fact-situation presented by the menace of current Communist enterprise. In its

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[35] It is interesting to point out the court's statement (per Circuit Judge Friendly) that "[e]ven if we were to assume in appellant's favor that action designed 'to block the launching' constituted speech . . ., 'freedom of speech . . . does not comprehend the right to speak on any subject at any time', American Communications Assn. v. Douds, 339 U.S. 382, 394 . . ." (310 F. 2d at 345.)

[36] It is significant that in *Board of Education* v. *Barnette,* 319 U.S. 624, 643, 63 S. Ct. 1178, 1188 [1943], *supra,* Mr. Justices Black and Douglas stated that "[n]o well-ordered society can leave to the individuals an absolute right to make final decisions, unassailable by the State, as to everything they will or will not do. The First Amendment does not go so far."

> new form the rule might be called the 'electric eye' theory of clear and present danger. The danger is deemed to exist if there is a present and continuing mechanism which upon the occurrence of appropriate conditions will trigger into activity a future operation which constitutes a danger of substantial magnitude." See (DUMBAULD, BILL OF RIGHTS AND WHAT IT MEANS TODAY 122 [1957], *supra.*)

Ought not the atmosphere of these times also prompt us to deem the application of such a test (as restated by Chief Judge Learned Hand) as equally appropos? Is not the appellant's act (although having affected the sensory perceptions of but a relatively small segment of our population on a Brooklyn street) *when taken with the manifold dangerous behaviorisms of our day,*[37] *one which may "trigger into* activity a future operation which constitutes a danger of substantial magnitude?" Is the act less dangerous because the likelihood that its effect, unlike in *United States* v. *Dennis,* 341 U.S. 494, 71 S. Ct. 857 (1951), *supra,* does not *immediately* envelope a much larger audience? Might not the rebellion of the appellant, particularly by the desecration of an American flag, in an area of sympathizers have the same imminent and basically devastating effect as the acts of Dennis and his followers (see Appendix C). One need only reflect on present-day occurrences to note the oft-repeated patterns of rebellious behavior, as distinguished from proper dissent, that have come to life throughout the length and breadth of this land.

The "clear-and-present-danger" test has never been a technical verbal formula. (See *Pennekamp* v. *Florida,* 328 U.S. 331, 352-53, 63 S. Ct. 1029, 1040 [1946] [Frankfurter, J., concurring].). And whether or not the modified test of

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[37] See p. 72 *infra.*

Chief Judge Learned Hand be applied, it, too, as the "balancing-of-interests" test, can be practically considered in the instant appeal so that the appellant's act cannot escape the reprobation it so richly deserves. Is not an act such as committed by the appellant one which will "treasonably" lend aid and comfort to the enemy by strengthening its hand? Any failure to preserve law and order creates the clear and present danger that the expression involved, *symbolic or otherwise,* "will bring about the substantial evils that Congress has a right to prevent." (*Schenck* v. *United States,* 249 U.S., *supra;* at 52, 39 S. Ct. at 249 [1919].) The question of free expression must yield to the higher requirement that the United States of America must survive in the hostile atmosphere of a tumultuous present-day history. It is this vital need which makes even the words by the appellant, in derogation of the flag, without more, subject to criminal punishment. Circumstances appear again to have restored the *Schenck, Frohwerk,* and *Debs* cases,[38] to a new vitality.

The American flag symbolizes everything dear to us, and is entwined within the very framework of our Bill of Rights. The flag is a home away from home and throughout the world whenever an American chances to see it, the inspiration derived from its presence is immeasurable. To accord the appellant license to mistreat the flag is as implausible and inconceivable as a determination that one has a constitutional right to destroy the Constitution. For it was on June 14, 1977 that "Old Glory" was formally adopted by the Continental Congress as the national flag, and ". . . the

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[38] *Schenck* v. *United States,* 249 U.S. 47, 39 S. Ct. 247 (1919), *supra; Frohwerk* v. *United States,* 249 U.S. 204, 39 S. Ct. 249 (1919), *supra; Debs* v. *United States,* 249 U.S. 211, 39 S. Ct. 252 (1919), *supra.* See note 32 *supra* at 67.

flag like the nation itself, evolved slowly and painfully from small beginnings; that it was shaped by many hands and brains..." (Butterfield, *Foreword* to Quaife, Weig & Appleman, THE HISTORY OF THE UNITED STATES FLAG at 11 [1961].)

To sanction the appellant's conduct as a form of constitutionally protected expression is to lend aid and comfort to those who seek to corrupt the very foundation of the liberties we seek to preserve. Thus, those liberties which are inherent in the wellspring of Democracy are debased and negated so that the cherished liberty of free speech, symbolic or otherwise, becomes slowly and undeniably destroyed, rather than perpetuated. Contempt and hatred are contagious and misanthropes, totalitarians, and malcontents harken to their call. To paraphrase Mr. Chief Justice Hughes, the excesses of free speech are apt to destroy free speech itself, unless properly fettered. (See *Cox* v. *New Hampshire,* 312 U.S. 569, 574, 61 S. Ct. 762, 765 [1941].) The appellant by his conduct was in a manner openly inviting others to share his contempt for the flag and the Country it represents. It is in these times, especially, that honor to the flag must be given its fullest meaning. To condone the public disapprobation of a precious and inspiring symbol of America itself becomes, with other recent events[39],

[39] The assassinations of a President, United States Senator, and Nobel Peace Prize recipient, destroying of draft cards, wholesale evacuations to Canada to avoid military service, student riots, the most serious being at Howard and Columbia Universities, disturbances in socially and economically disadvantaged areas, emergence of a "hippie" generation, open disregard for decorum on the part of elected officials, rise in crime statistics, activities of extremist groups, and the new "palliative" (?) world of LSD and its psychedelic adventures. This would appear to indicate that we are already in the epoch where some of these events, particularly the desecration of the flag by "words or act," will give rise to an angry crowd, thereby mandating some reasonable restrictions with regard to speech and conduct. Americans have more to fear than the dangers of the Communist Manifesto!

a vivid reflection of disrespect for our institutions. Society may soon find itself urgently in need of preparing for the likelihood that this Nation may find it exceedingly onerous to withstand the challenges of an era of arrogance. Can anyone of us, today, honestly and confidently, take the position that the appellant's act of defiantly burning the flag, if ignored and left unpunished, will not finally ignite the spark of conflagration and chaos tomorrow? One need not be a prophet of doom to state that we must look at reality with a circumspect eye. It would be the height of naiveté to say that we are living in a predominantly patriotic society free from undermining influences. It would appear reasonable to state that we are part of a society which consists of a significant populace who either have chaotic and anarchic thought, on the one hand, or, who harbor cold indifference, on the other. To legitimatize the appellant's unforgiveable act is to draw the attention of the world to our problems, with ensuing disrespect. Certainly there can be no reverence for a flag that can be defiled and treated with contempt. Nor will there be any meaning left for the flag which draped the caskets of those who shed their lives for our Nation, and inspired countless deeds of glory. To dignify the appellant's conduct is to reduce the flag to an empty piece of cloth, and to transform it from meaningfulness to meaningless ornament. If the flag is now to take on merely an ornamental significance, then can it not be said that those who have shed their lives for it were not only duped by it, but that it has made a mockery of patriotism? *It cannot be denied that to scorn a flag is to erode a nation from within!*

There is a public interest in having our flag waving as a symbol of the United States. Disrespect for it is inimical

to the public welfare and can only encourage others to do the same.[40] The flag must continue to remain in an exalted position as symbolic of unity, strength, and friendly recognition. Where healthy criticism may help to correct, the appellant's act can only chip away at the pillars of democracy.

Can we say that our citizens of earlier days have toiled and sacrificed for ideas that the appellant may now be free to make worthless? Should one generation be permitted to nullify the dreams begun by those who preceded us? To tolerate that will extinguish the light which illuminates the path of human achievement. Great men, great thoughts, and great times cannot be brought forth from such perilous behavior. Man's betterment requires richer soil in which to flourish. "Perhaps at no time in our Nation's history has there been a greater need to make clear to all that the United States Constitution does not render States impotent . . ." (*Cameron* v. *Johnson*, 381 U.S. 752, 753, 85 S. Ct. 1751, 1757 [1965] [Black, J., dissenting, in which Harlan and Stewart, JJ. or join].)

While such cases as *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624, 63 S. Ct. 1178 (1943), *supra*, hold that one need not salute the flag; it does not follow from such a determination that it can become the proper subject of desecration, or upon which to cast calumny. The statute extirpated in *Barnette, supra*, compelled

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[40] For pictorial representations of flag burnings here and abroad, see Appendices C and D *infra*.

See also, N.Y. Times, April 29, 1967, p. 35 col. 2 (Madrid University students reported burning American flags on April 28, 1967). For a general treatment of present-day attitudes toward the flag, see Life Magazine, *A Test for Old Glory*, March 31, 1967, p. 18; Battle Over the Bill of Rights, *id.* at 22; Hoge, *A Record of Flag Desecration*, American Legion Magazine, November, 1967, p. 6.

positive action of saluting the flag. The present statute does not require any affirmative action nor does it prescribe orthodox conduct. It simply forbids public acts of dishonor to the flag of the United States. The right to communicate ideas or engage in political dissent or protest in a *responsible manner* remains unimpaired. The encouragement of reverence and respect for the flag is not to be equated with compelling one to express a belief contrary to the dictates of conscience. Such inspiriting becomes implanted in others when "words or act(s)" of defilement of the flag are not caused to be impressed upon their senses.

A love for our flag can blossom without being impelled by a chauvinistic attitude, nor need the desire to protect it be affected by hysteria[41]. (Compare *Ex parte Starr*, 263 F. 145 [Dist. Ct., Mont. 1920], *supra*.) Affirmance of the appellant's conviction will in no wise detract from the commendable fidelity with which this Court has always defended freedom to act, or speak one's mind.

On August 27, 1952, Adlai Stevenson stated in New York:

> "What do we mean by patriotism in the context of our times? . . . A patriotism that puts country ahead of self; a patriotism which is not short, frenzied outbursts of emotion, but the tranquil and steady dedication of a lifetime. These are words that are easy to utter, but this is a mighty assignment. For it is often easier to fight for principles than to live up to them."[42]

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[41] The principles of the American's Creed are followed throughout the Nation, and one of its principles sets forth "respect to the flag." That many adhere to this principle is made evident by the number of flags sold by *one* New York City newspaper in less than one year (see Appendix E *infra*).

[42] Fullbright, *The Arrogance of Power* 22 (1966).

Any view that the instant statute has for its purpose the encouragement of adhering to symbols cannot be accepted as sound. As aptly stated by Mr. Justice Frankfurter in *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624, 63 S. Ct. 1178 (1943), *supra*:

> "We are told that symbolism is a dramatic but primitive way of communicating ideas. Symbolism is inescapable. Even the most sophisticated live by symbols. *But it is not for this Court to make psychological judgments as to the effectiveness of a particular symbol in inculcating concededly indispensable feelings, particularly if the state happens to see fit to utilize the symbol that represents our heritage and our hopes.*" (*Id.* at 662, 63 S. Ct. at 1196, dissenting opinion, emphasis supplied.)

It is for this reason that no merit ought to be attached to the appellant's contention that since "flag destruction is in some metaphysical way an affront to our symbolic sovereignty, [i]t cannot and ought not form a basis for punishment." (Brief for Appellant, p. 25.)

Assuming, *arguendo*, that the appellant herein found that a free speech interest existed in flag desecration, particularly, flag burning, applying the "balancing-of-interests" test, the governmental need for a symbol such as a flag and the encouragement of respect for it by all citizens, without mandating it (particularly among the young and impressionable, aliens who may wish to become our citizens, visitors from abroad, and foreign nations as well) greatly outweigh the concern for free expression, and the enactment of a law outlawing public desecration of the flag by "words or act," is a reasonable and unarbitrary means toward implementing the encouragement of such respect. Since the indi-

vidual, unlike the State or Nation, has alternatives in making himself heard, his free speech interest needs to be limited.

It was for this reason that a "governmental interest" was accorded protection recently in *United States* v. *O'Brien*, U.S. , 88 S. Ct. 1673 (1968), when this Court, in a majority opinion, condemned conduct "having no connection with speech" (*id.* at 1678), to wit, destruction of certificates issued by the Selective Service System. There, too, it was reiterated that the Court could not "accept the view that an apparently limitless variety of conduct can be labelled 'speech' whenever the person engaging in the conduct intends thereby to express an idea" (*id.* at 1678). Significantly Mr. Chief Justice Warren added:

> "However, even on the assumption that the alleged communicative element in O'Brien's conduct is sufficient to bring into play the First Amendment, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity. This Court has held that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. . . . [W]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the government; if it furthers an important or substantial government interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedom is no greater than is essential to the furtherance of that interest." (*Id.* at 1678-79.)

The appellant ought not to be permitted to say that prohibiting him from desecrating the flag by "words or act,"

will have "the effect of *entirely* preventing [him] from reaching a significant audience with whom he could not otherwise lawfully communicate." (*Id.* at 1685, Black, J., concurring; emphasis supplied.) The appellant can convey his message in other ways.[43]

The "governmental interest" referred to in *United States v. O'Brien, supra*, also mandates protection for the American flag, so that its desecration will not create for those who honorably serve their Country in one conflict, and who are not the masters of their fate, another battleground, purely psychological and emotional, in which the struggle may be greater. Far more serious is the scope of danger here than the strong probability that the appellant's act will occasion a breach of the peace within our own borders. Constitutional guarantees require limitations which will narrow this compass of danger. A Nation cannot hope to survive if those who serve it in conflict, in foreign lands, become subjected to agonizing demoralizations arising at home by contempt for those ingrained ideals, spiritual or physical, which spur them on to obeisance and loyalty. And whether a cause of conflict is just or not, it is the electorate, in the final analysis, who will receive the greater punishment as morale is lowered. Until conflict ends, victory must be its goal, and safety for the soldier, which poor morale impedes, must be kept at its highest level.

Nor is the elevation of morale devoutly to be sought only for those who serve in conflict. Whether the time is one of

---

[43] There appears to be a more instinctive feeling of respect for the flag than for a draft card, since it begins to make a strong impression upon us earlier in life. Again, a draft card is physically the personal property of the registrant and its destruction, ordinarily, would not affect us, as much as does the desecration of the flag of the United States which belong to the citizenry at large.

peace or conflict, any act of flag desecration tends to lower the very pride of the citizen in his Country, and the lessening of such pride proportionately increases as the impression made by the act of desecration becomes stronger when like acts go unpunished. This is another reason for not condoning flag desecration.

It is significant that in *Beauharnais* v. *Illinois,* 343 US 250, 72 S. Ct. 725 (1952), *supra,* Mr. Justice Frankfurter, in a majority opinion, in effect upheld the dignity of the person by enforcing an Illinois group libel statute enacted to shield a segment of our society from malignment, at the same time recognizing the existence of serious racial problems in our Country. (*Id.* at 258-61, 72 S. Ct. at 731-33.) Preserving the respect for the flag, as well as for the dignity of the person, are the desirable goals of a democratic society, for one cannot exist without the other.

It would be ironic indeed to maintain that we have a duty to punish those who "bring into public odium any foreign government . . . or bring into public disrepute its political, social, or economic acts or views" (see *Frend* v. *United States,* 100 F. 2d 691, 692 [D.C. Cir. 1938]), without conceding that we have the correlative obligation of similarly punishing those whose acts are also as offensive to us, particularly when the act complained of is the burning of our cherished flag. (See N.Y. Times, April 11, 1967, p. 8, col. 1), wherein it was reported that oral protest was presented by Robert H. McBride, the United States Embassy Minister, to Jacques de Beaumarchais, director of Political Affairs at the Foreign Ministry, for the flag-burning incident in Paris on April 7, 1967.)

In fine, we must protect our Country at all times. The anticipation of an attempt to overthrow our basic tenets of democracy by arrogant behavior designed to flout our institutions, and flag burning is such an attempt, must be our prime concern. We cannot afford to experiment by permitting all acts and words denigrating our basic philosophies to freely reach the marketplace of ideas. The vitality of such a view was inherent in the determination of *Dennis* v. *United States,* 341 U.S. 494 (1951), *supra* at 509-10, 71 S. Ct. at 867, when it was succinctly stated:

> "We must reject . . . the contention that success or probability of success [to overthrow the Government] is the criterion." (Vinson, Ch. J.)

In another landmark case, this Court declared:

> "[T]he immediate danger is none the less real and substantial, because the effect of a given utterance cannot be accurately foreseen. The State cannot reasonably be required to measure the danger from every such utterance in the nice balance of a jeweler's scale. A single revolutionary spark may kindle a fire that, smouldering for a time, may burst into a sweeping and destructive conflagration. It cannot be said that the State is acting arbitrarily or unreasonably when in the exercise of its judgment as to the measures necessary to protect the public peace and safety, it seeks to extinguish the spark without waiting until it has enkindled the flame or blazed into the conflagration; . . . it may in the exercise of its judgment, suppress the threatened danger in its incipiency." (*Gitlow* v. *New York,* 268 U.S. 652, 669, 45 S. Ct. 625, 631 [1923], *supra,* [Sanford, J.].)

To paraphrase *Gitlow, supra,* are we required to wait for an epidemic to break out before the doctor is summoned?

The appellant's right as a citizen to criticize his Country and to effectively participate in public affairs is not denied him by the fact that Sec. 1425, subd. 16, para. d, of the Penal Law of the State of New York, *supra,* also bars the use of "words" as well as "act" in the interdicted conduct affecting the flag of the United States. The use of "words" which "defile or defy . . . or cast contempt" upon the flag "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is greatly outweighed by the social interest in order and morality." (See *Chaplinsky* v. *New Hampshire,* 315 U.S. 568, 572, 62 S. Ct. 766, 769 [1942]; CHAFEE, FREEDOM OF SPEECH 170 [1920].)

As has already been shown in Argument A *supra,* the statute, being narrowly drawn, does not violate any constitutional mandates regarding the right to enjoy freedom of speech. And if there be any doubt as to the constitutional propriety of including "words" within the prohibition of the statute, which we do not anticipate (for the reasons already presented, and especially when we note the rebellious nature of the words employed herein simultaneously with the act performed), that doubt can easily be resolved by excising that language and leaving inviolate the punishment of the act of which the appellant was accused, except insofar as the language employed spelled out the "contempt" displayed by him.

As succinctly stated by Judge Cardozo in *People ex rel. Alpha P. C. Co.* v. *Knapp,* 230 N.Y. 48, 129 N.E. 202 (1920):

> "In this state, we have gone far in sub-dividing statutes, and sustaining them so far as valid (*Dollar Co.* v. *Canadian C. & F. Co.,* 220 N.Y. 270, 278, and

cases there cited; *People* v. *Beakes Dairy Co.*, 222 N.Y. 416, 432; *People ex rel. Penn. Gas Co.* v. *Saxe*, 229 N.Y. 446). The tendency is, I think, a wholesome one. Severance does not depend upon the separation of the good from the bad by paragraphs or sentences in the text of the enactment (*Loeb* v. *Columbia Township Trustees, supra,* (179 U.S. 472, 490). The principle of division is not a principle of form. It is a principle of function. The question is in every case whether the legislature, if partial invalidity had been foreseen, would have wished the statute to be enforced with the invalid part exscinded, or rejected altogether. The answer must be reached pragmatically, by the exercise of good sense and sound judgment, by considering how the statutory rule will function if the knife is laid to the branch instead of at the roots. (*Id.* at 60, 129 N.E. at 207).

* * * * *

"Laws are not to be sacrificed by the courts on the assumption that legislation is the play of whim and fancy. . . . Our right to destroy is bounded by the limits of necessity. Our duty is to save unless in saving we pervert. *When all the world can see what sensible legislators in such a contingency would wish that we should do, we are not to close our eyes as judges to what we must perceive as men. This need is all the greater in fields where the law is in a stage of transition and readjustment* [citing case].". (*Id.* at 62-63, 129 N.E. at 207-08.) (Emphasis supplied.)

See also, *Williams* v. *Standard Oil Co.*, 278 U.S. 235, 241-242, 49 S. Ct. 115, 117 (1929).

To extirpate the language "words" from the statute would not avert further desecrations, but may encourage other abuses, written or spoken. The "statutory rule" will function much better "if the knife is [not] laid to the branch

[or] the roots." Courts, wherever possible, seek to save statutes.

See generally, *Panama Refining Co.* v. *Ryan*, 293 U.S. 388, 439, 55 S. Ct. 241, 256 (1935), *supra*, (Cardozo, J. dissenting); *United States* v. *Jin Fuey Moy*, 241 U.S. 394, 401, 36 S. Ct. 658, 659 (1916).

Although the Court of Appeals of the State of New York predicated its determination upon the view that the statutory purpose of the statute was to "prevent the outbreak of . . . violence by discouraging contemptuous and insulting treatment of the flag in public" *People* v. *Street*, 20 N.Y. 2d 231, 236, 229 N.E. 2d 187 [1967], *supra*, appellant's Appendix 8a), and as was emphasized in *People ex rel. McPike* v. *Van De Carr*, 91 App. Div. 20, 26 (1st Dept. 1904), *aff'd*, 178 N.Y. 425 (1904), *supra*,[44] it was our position at the time of argument in the Court of Appeals, and to which we respectfully still adhere, that what is *also* apparent is that the contemptuous treatment of the flag of the United States of America,[45] which would shock the conscience of any true American, nay, of any decent person, is serious enough, per se, to be treated as a criminal act and punishable if committed "publicly."

---

[44] See also, *Halter* v. *Nebraska*, 205 U.S. 34, 41, 27 S. Ct. 419, 421 (1906), *supra*. *But see People* v. *Picking*, — Misc. —, 23 N Y S 2d 148, 149 (N.Y.C. Mag. Ct. 1940), *aff'd*, 263 App. Div. 366 (1st Dept. 1942), *aff'd*, 288 N.Y. 644 (1942), *cert. denied*, 317 U.S. 632 (1942), *supra*, where the court indicated that the aim of the statute was to "hold up the dignity of the American Flag . . ."

[45] It appears obvious that for the purposes of the statute herein involved, any asserted claim of "title" to the flag by a defendant would be meaningless. The flag, as such, like money, is the unique property of the United States of America and its citizens as a whole, except that the proper use of it by individuals is encouraged. The material ownership of the flag, although in the appellant, must yield to the stronger spiritual right to it as vested in our land and its citizens.

It is the public display of such ignominious conduct which accentuates the danger of the act, not only from a "breach-of-the-peace" sense, but from the ineffaceable debasing effect, however slight, such desecration may have upon another's respect for the symbol of our cherished liberties, if what is thus seen goes unpunished.

What can be gained by abusing our flag under the guise of unfettered expression? Certainly, the harm that will result greatly outweighs the need for constitutional protection that is sought for such expression. An act of contempt done in public, as in this case, is condemnable because it maligns our flag in the eyes of others, and detracts from the respect one would ordinarily show for the flag if he were not "treated" to such a spectacle. It may even encourage others to perform similar, or as equally unforgiveable, acts against the flag of our Nation. Thus, in order to preserve the sanctity of the flag, the Legislature of the State of New York[46] wisely provided that an act such as committed by the appellant herein would suffer punishment if done "publicly."

It is noteworthy that Sec. 1425, subd. 16, para, d, of the Penal Law of the State of New York, *supra,* sets forth conduct violative of Article 134, which has for its sole purpose the prohibition of various forms of conduct, specified in detail, and described as "Malicious Mischief." All of this has been superseded by L. 1965, c. 1031, sec. 52, eff. Sept. 1, 1967, and further identified as Section 136 of the General Business Law of the State of New York. This would indicate an *additional* legislative purpose to pro-

[46] See 51 N.Y. State Dept. Rep. 240 (1934), and 1941 N.Y. Att'y Gen. Rep. 465, *supra* at 59.

tect the flag from public desecration dehors any desire to prevent a breach of the peace. Otherwise, many acts of desecration would escape punishment because of the difficulty in showing that a breach of the peace occurred, or might have been occasioned (*i.e.*, when the flag is used for advertising purposes).[47] The proscription, therefore, appears to be two-pronged—to condemn the disrespect of a needed and worthy symbol, as well as to avert an imminent breach of the peace.

It is interesting to note that "contempt" is also defined as follows:

> "4a: wilful disobedience to or *open* disrespect of the valid rules, orders, or process or the dignity or authority of a court or a judge acting in a judicial capacity . . . " (Webster's New Int. Dictionary [3rd ed. 1964] [emphasis supplied].)

Thus, "open," which is synonymous with "public," when considered in the light of the above definition of "contempt," lends some significance to the view that punishment in the instant case is mandated, not only for a "breach of the peace," or its likelihood, but, also, for the act of disrespect, in and of itself. The contempt of the type shown in the above dictionary meaning does not need to rest upon any consideration of "breach of the peace," since what is punished is the degrading of, or casting disrespect upon, a court and judge in the presence of others who comprise the "public." And so it is with the instant statute; it is the contumelious conduct toward the flag of the United States in the presence of others which we seek to reproach so that a symbol of our liberties is not relegated to a state of opprobrium.

---

[47] Also, where one desecrates a flag in public with no audience other than a group of very young children with impressionable minds, who could not plausibly ever become involved in a breach of the peace by what they saw or heard.

It must not be overlooked that there was a strong probability indeed that the appellant's act could easily have resulted in a breach of the peace. A war veteran, for example, would not be likely to be insensible to the sight of the appellant's desecration of the flag.

Had not the police officer chanced to be nearby, there existed a grave possibility that the impact of the appellant's conduct might have penetrated the recesses of the minds of some of those passersby in that socially and economically disadvantaged area, and thus incited violent action favoring the appellant's act. Such an occurrence is not too remote when we consider the various disturbances throughout the Country in recent times. That it did not happen, though fortunate, is of no import, for, to reiterate, there was a strong likelihood of it,[48] and in any event, the appellant's "contempt" for the flag "publicly," warrants punishment under the statute.

Appropriate, indeed, is the language of Mr. Justice Douglas who, in recognizing that conditions may affect behavior, stated in *Dennis* v. *United States*, 341 U.S. 494, 71 S. Ct. 857 (1951), *supra*:

> "In days of trouble and confusion, when bread lines were long, when the unemployed walked the streets, when people were starving, the advocates of a short-cut by revolution might have a chance to gain adherents." (*Id.* at 588, 71 S. Ct. at 906, dissenting opinion.)

---

[48] The substantive evil of a breach of the public peace was imminent from the appellant's conduct, and from the very nature of flag desecration, the "imminence" need not be expressly set forth in the statute. The appellant's acquittal on the charge of Disorderly Conduct does not inure to his benefit. He was convicted of violating the statute covering Malicious Mischief because his act was specifically prohibited by it. The "imminence" of danger is inherent in the insult, although "likelihood" is the least the statute requires.

The appellant's conduct becomes a pattern for others with hidden anger for our Nation.

Terminiello v. *Chicago*, 337 U.S. 1, 69 S. Ct. 894 (1948), upon which the appellant relies, was one in which actual expression was involved. The State wishes to emphasize again that the appellant's act was not one to which symbolic quality can be attached. Further, in *Terminiello*, as distinguished from *Feiner* v. *New York*, 340 U.S. 315, 71 S. Ct. 303 (1951), the defendant had been convicted for causing a breach of the peace by delivering a speech indoors which stirred outside public to anger. A function of free speech is to invite dispute. *Feiner*, on the other hand, had suffered the penalty of the law for creating the clear danger of public disorder while delivering insults on the street.

Pedestrians assume many risks, such as the noises of vehicular traffic, physical contacts with other people or vehicles, and so forth. Nevertheless, they are entitled to be spared from onslaughts upon their sensibilities when one publicly casts contempt upon our flag. While insults to one's origin, as in *Terminiello, supra*, leaves for the offended the consolation that Democracy is the salvation, the other deteriorates the very concept which creates our pride in citizenry. Ordinary events which we encounter during the course of a day are easily forgotten, but the sight of an American flag being scornfully set on fire is bound to have a traumatic effect on the decent person who chances to be present at the time. One should not be made a "captive" of such events. (Compare *Public Utilities Comm'n* v. *Pollak*, 343 U.S. 451, 469, 72 S. Ct. 813, 824 [1952] [Douglas, J., dissenting].)

In concluding, it is respectfully prayed that no constitutional guarantee be permitted to shield the appellant's act

from punishment, and whether this Court shall, or shall not, attach the quality of symbolic expression to the burning of the flag of the United States, it is, nevertheless, so patently offensive to, and "sacrilegious" of, the deep traditional feelings of the American and the very spirit of this Country's history, that it would be unthinkable to shelter such conduct under the protective mantle of our treasured Constitution with which the flag is inseparably fused. To do that, would make constitutional guarantees the very means of self-annihilation!

> "The choice is not between order and liberty. It is between liberty with order and anarchy without either. There is danger that, if the Court does not temper its doctrinaire logic with a practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact." (*Terminiello* v. *Chicago*, 337 U.S. 1 [1948], *supra* at 37, 69 S. Ct. at 911 [Jackson, J., dissenting].)

It is respectfully prayed, therefore, that the desecration of the American flag again leaves for this Honorable Court the wisdom of determining that the choice must be "liberty with order," rather than "anarchy without either."

CONCLUSION

The judgment and decision of the New York Court of Appeals in this case below should be affirmed.

Dated: Brooklyn, New York
September, 1968

Respectfully submitted,

ELLIOTT GOLDEN
Acting District Attorney
Kings County
Office & P.O. Address
Municipal Building
Brooklyn, N.Y. 11201
Attorney for Appellees

HARRY BRODBAR
Assistant District Attorney
Of Counsel

Appendix A-1, A-2

PHOTOPRINT

(Mounted opposite)

APPENDIX A-1

RICHARD J. BARTLETT, CHAIRMAN
TIMOTHY N. PFEIFFER, VICE CHAIRMAN
CHARLES B. RANGEL, SECRETARY
BENJAMIN ALTMAN
HYMAN BARSHAY
EARL W. BRYDGES, JR.
JOHN J. CONWAY, JR.
JOHN R. DUNNE
FRANK S. HOGAN
HOWARD A. JONES
WHITMAN KNAPP
ARCHIBALD R. MURRAY
EDWARD A. PANZARELLA
BERNARD C. SMITH
HERBERT WECHSLER

STATE OF NEW YORK
TEMPORARY COMMISSION ON REVISION
OF THE
PENAL LAW AND CRIMINAL CODE

ROOM 884
155 LEONARD STREET
NEW YORK, N. Y. 10013

CO 7-1708

RICHARD G. DENZER
EXECUTIVE DIRECTOR

PETER J. McQUILLAN
COUNSEL

August 15, 1968

Harry Brodbar
Assistant District Attorney
Kings County
Municipal Building
Brooklyn, New York 11201

Dear Mr. Brodbar:

I have your letter of August 5, 1968 addressed to Richard Bartlett, Esq., the Chairman of this Commission, concerning your flag-desecration case (Street v. New York) now pending in the Supreme Court of the United States.

The former Penal Law section dealing with this subject contains a number of other provisions of a commercial nature (e.g., using the flag for advertising purposes). The criminal provision with which you are concerned was sandwiched in between others of the sort I have just described. By and large, therefore, the section in question was not primarily of a penal nature and, in our view, belonged in the General Business Law rather than in the Penal Law. It was mainly for this reason that such transfer was effected.

At the time of the passage of our large transfer bill, which relocated hundreds of sections in other bodies of law, flag burning was not a cause celebre and it seemed of little moment whether the flag desecration portion of the statute were to be found in the Penal Law or the General Business Law. If the transfer bill had been submitted in 1967 rather than in 1968, we probably would have left that provision in the Penal Law. The fact of the

APPENDIX A-2

transfer, however, is of no legal significance so far as I can see. A vast portion of the criminal statutes of New York State are found in bodies of law other than the Penal Law and they are no less crimes for that reason. Accordingly, I can discern no persuasive legal argument that can be made on the basis of the transfer in question.

Sincerely,

RGD:HEG

Richard G. Denzer
Executive Director

Appendix B-1, B-2

Photoprint

(Mounted opposite)

PROPERTY CLERK'S INVOICE

Pr. Cl. 1 (Rev. 10-62)

APPENDIX B-1

THE CITY OF NEW YORK

POLICE DEPARTMENT

THIS PROPERTY IS:

☒ Required as EVIDENCE ☐ *DECEDENT'S PROPERTY ☐ FOUND PROPERTY ☐ OTHER

(See instructions on reverse side)

Officer Assigned — Date: June 6, 19 66

Prisoner's Name — Rank — Shield No. — Command

Address

Date of Arrest — Arrest No. — Charge

Finder of Property — Address — U.F. 61 No.

Claimant's Name — Address — Apt. No.

ITEM NO.	QUANTITY	ARTICLE	**CASH VALUE U.S. Currency only	(For Property Clerk's Use Only) DISPOSITION and DATE
	1	Misc. Fragments of U.S. Flag		

REQUEST FOR FINAL DISPOSITION

I acknowledge having received the above articles which will be invoiced to the Property Clerk.

Rank — Signature of Desk Officer — Shield No.

LOCATION WHERE PROPERTY STORED: MISC

The articles listed hereon were received and verified by:

Rank — Signature — Shield No.

PRECINCT — VOUCHER NO. — YEAR

88 — 805 — 1966

PROPERTY CLERK'S VOUCHER NO.

[over]

REMARKS:

APPENDIX B-2

RECEIVED

'66 JUN 13 PM 1:10

PROPERTY CLERK'S
OFFICE BROOKLYN

INSTRUCTIONS:

1. Property coming into the custody of this department (except motor vehicles) shall be promptly invoiced on this form, which shall be typewritten in quadruplicate (2 white, 1 buff, 1 green), and forwarded with the property to the Property Clerk's office. The green copy shall be receipted by the Property Clerk and returned to the originating command for file. An additional green copy shall be prepared and forwarded to the Property Clerk with narcotics and decedent's property.
2. Separate vouchers shall be prepared for: a) prisoner's personal property; b) firearms; and c) narcotics.
3. If there is more than one prisoner, finder or claimant involved, enter the additional names and addresses under "Remarks". If owner or claimant is a corporation, give the corporate name, not the name of an individual connected with it.
4. U.S. currency shall be entered first, then foreign money, jewelry, etc. Each denomination of currency (bills and coins) shall be given an item number. The serial number of each bill shall be listed. Under "Cash Value", the total amount for each denomination of U.S. currency shall be entered.

**5. The estimated value of the property shall be entered under "Cash Value" ONLY when the property is returned to a claimant at the station house. The claimant's name and address and time and date of return of property shall be entered under "Remarks".

6. Security lead seals shall be used where appropriate and the seal number shall be entered alongside the description of the article. Not more than five articles shall be placed on one seal.
7. When invoicing found property, a transcript of the blotter entry concerning its finding shall be entered under "Remarks".

*8. When invoicing decedent's property, name and address of deceased and related aided case number shall be entered under "Remarks".

Appendix C

"What So Proudly We Hailed . . .
An American flag burns in the Sheep Meadow of Central Park, and not by accident, as peace marchers warm to the task of marching to the UN in protest of the war in Vietnam. A crowd estimated at 125,000—far short of the predicted 400-500,000 demonstrators—marched through midtown for the "Spring Mobilization Against the War in Vietnam." Despite the inflammatory nature of the occasion, almost 3,000 cops kept the peace." Courtesy of The News, New York's Picture Newspaper, Sunday, April 16, 1967, final ed. p. 120.

Photograph

(Mounted opposite)

New York Daily News
April 16, 1967
depicting flag-burning
incident in Central Park,
New York City-April 15, 1967.

APPENDIX C

Appendix D

PHOTOGRAPH

(Mounted opposite)

New York Times, April 8, 1967, p. 1

Associated Press Cablephoto

In the Place d'Iéna, near Arc de Triomphe, where Mr. Humphrey placed a wreath at the Tomb of the Unknown Soldier, peace demonstrators burn American flag. Thursday was the 50th anniversary of U.S. entry into World War I.

Appendix E

PHOTOPRINT

(Mounted opposite)

APPENDIX E

THE NEWS
NEW YORK'S PICTURE NEWSPAPER
220 EAST FORTY SECOND STREET
NEW YORK, N.Y. 10017
MURRAY HILL 2-1234

J. HAROLD FORBES, JR.
EDITORIAL PROMOTION MANAGER

September 12, 1968

Mr. Harry Brodbar
Assistant District Attorney
Appeals Bureau
Municipal Building
Brooklyn, New York 11201

Dear Mr. Brodbar:

I am setting forth below the information about the flag sales which you requested in your letter of June 21, 1968, addressed to the Editor. The total number of sales, as of September 10, 1968, is:

	WENT ON SALE	PRICE COUNTER	PRICE MAIL	SALES COUNTER	SALES MAIL	TOTAL SALES
Window Flags	10/1/67	$1.00	$1.35	55,156	56,389	111,545
Flag Decals	12/6/67	.05	.05	325,362	37,852	363,214
U.S. Flag Kits	4/19/68	3.00	3.50	14,751	15,910	30,661
						505,420

I'll be very glad to bring you up-to-date any time in the future. Just let me know.

Sincerely yours,

J. Harold Forbes Jr.

SUPREME COURT, U. S.

FILED

OCT 4 1968

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 5

SIDNEY STREET,

Appellant,

against

PEOPLE OF THE STATE OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF OF ATTORNEY GENERAL OF THE STATE OF NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF APPELLEE

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 5

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ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF OF ATTORNEY GENERAL OF THE STATE OF NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF APPELLEE

Statement of Interest of *Amicus Curiae*

The instant case involves the constitutionality of New York Penal Law, § 1425, subd. 16(d) (now General Business Law, § 136[d]), making desecration of the American flag a misdemeanor. Under New York law, each District Attorney in the counties of the State is charged with the responsibility of prosecution and with the upholding on appeal of convictions from such prosecutions (County Law, § 700), while as the chief legal officer of the State (New York Executive Law, § 63), the Attorney General is charged

with the defense of State statutes (Executive Law, § 71; N. Y. Civil Practice Law and Rules § 1012[b]). This brief, consequently, is submitted in support of the position that Penal Law, § 1425, subd. 16(d) is compatible with the First Amendment guarantee of freedom of speech.

Questions Presented

1. Does New York Penal Law, § 1425, subd. 16(d), abridge freedom of speech as guaranteed by the First Amendment to the United States Constitution?

2. Is New York Penal Law, § 1425, subd. 16(d) void for vagueness?

Summary of Argument

Flag desecration is not protected speech. The state has an interest in protecting this national symbol from public, physical contempt just as it can exact minimal loyalty oaths. Assuming, *arguendo*, that such desecration is "symbolic speech", it conveys no meaning of itself, but serves merely to dramatize words and, in light of the legitimate interest in protecting national symbols and maintaining public order, is subject to regulation.

Appellant may not attack the statute as void for vagueness since the issue was not raised in the trial court and there is no indication that either appellate court passed on the issue. In any event, the statute is neither imprecise nor overbroad. Not only is the statutory language easily understood but there is no evidence that it has ever been employed to punish speech alone. The statute is fully compatible with the interpretation of the Court of Appeals making speech merely evidence of the intent behind physical destruction.

POINT I

Flag desecration is not protected speech within the meaning of the First Amendment.

The American flag is a national symbol which federal and state policy declare should be treated with respect and even with ceremony. 4 U.S.C. §§ 1-3; 36 U.S.C. §§ 172-177; Uniform Flag Act, 9B Uniform Laws Annotated. New York Penal Law, § 1425, subd. 16(d),* is designed simply to further this policy by declaring flag desecration a misdemeanor. It is neither the purpose nor effect of the statute to promote orthodoxy of thought, to stifle dissent or to prevent a single idea from reaching the market place.** The statute merely reflects the policy that some minimal respect for this symbol is desirable, that respect being no more than a prohibition of public acts of physical violence against the flag.

To forbid desecration of this symbol is no more a limitation on freedom of expression than is requiring an oath to uphold the Constitution of the United States. *Bond* v. *Floyd,* 385 U. S. 116, 132; *American Communications Association* v. *Douds,* 339 U. S. 382, 414; *Knight* v. *Board of Regents,* 269 F. Supp. 339 (S.D.N.Y. 1967), *aff'd.* 390 U. S. 36. Indeed, such an oath is an affirmative act requiring much more of a person than the refraining from an act of public flag mutilation. This minimal requirement of respect for the flag should be no less enforceable than such an oath. The importance of the flag as a national symbol

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* Now N. Y. Gen. Bus. Law, § 136(d).

** Legislation to protect the flag arose out of the 1896 political campaign in which the parties used the flag as an emblem. As a result, it was often mutilated. In addition, commercial use of the flag was widespread. See Prefatory Note to the Uniform Flag Act, *supra.* The New York legislation, first adopted in 1899, was designed to prevent both these evils. N. Y. Laws of 1899, ch. 12, § 1. See Gen. Bus. Law § 136(a)-(c).

has long been recognized. *Halter* v. *Nebraska,* 205 U. S. 34. While positive action, such as a salute, may not be required (*West Virginia* v. *Barnette,* 319 U. S. 624), surely the flag has enough importance that its public desecration can be forbidden without impairing any First Amendment freedom. As this Court said in *United States* v. *O'Brien,* 391 U. S. 367, 376: "We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engagaing in the conduct intends thereby to express an idea."

Similarly the forbidding of flag desecration does not violate the First Amendment. It is beyond plausible dispute that such desecration is not speech. Appellant, recognizing this insists, that it is "symbolic speech". However, public destruction of the flag, unless explained, conveys no particular meaning. Once it is explained, and the exact nature of the protest is manifest, the mutilation of the flag is merely incidental to the thought conveyed by the words and is simply an act to dramatize the thought. Such conduct, like picketing and draft card burning, is subject to regulation. *United States* v. *O'Brien, supra; Adderly* v. *Florida,* 385 U. S. 39; *Cox* v. *Louisiana,* 379 U. S. 536. Indeed, picketing and draft-card burning can be said to be speech much more readily than flag-burning because, while they are specifically directed at the object of protest, flag-burning almost invariably is not. It cannot be said either to articulate the views of its perpetrator or to be an effective means toward implementing those views.* Certainly it is not a necessary means. Its lack of direct mean-

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* In the instant case, for example, the precise nature of appellant's protest would be impossible to discover but for his statements. Moreover, the notion that he may have been prosecuted for his words is not only unsupportable by the record but also is ludicrous in view of the fact that his outrage at the shooting of James Meredith must certainly have found sympathy among most citizens of New York, including the Judges on the New York Court of Appeals.

ing, the offensive nature of the act to a significant portion of the populace, its repugnance to national policy, the myriad avenues open for expression of ideas, including criticism of the public officials felt too responsible for the policies and events under attack, and the likelihood of public disorder, make flag-burning, on balance and whatever its speech content, limitable by law. And certainly, to the exent that we may have national symbols, we can accord them this minimal protection.

Appellant seems to place symbolic speech on a par with it not higher than other speech. He appears to suggest that the views of Professors McLuhan and Marcuse require constitutional recognition. Whatever impact the mass media and their tendency to cover the sensational must eventually have on our view of the First Amendment is of no moment here. Appellant's access to a wide audience is irrelevant. There is no constitutional right to go on radio or television. *National Broadcasting Co.* v. *United States,* 319 U. S. 190. Moreover, the right to have an image conveyed is not the same as "symbolic" speech. Since there is no right to be guaranteed the attention of the public at large, his belief that the drama of flag-burning will more readily be reported than the opinion behind it accords appellant no greater right to do what the statute forbids.

POINT II

Penal Law § 1425, subd. 16(d) is not void for vagueness.

Appellant contends that Penal Law § 1425, subd. 16(d) is both overbroad and imprecise. The contention is without merit. The first point which must be made with respect to this claim is that it was not raised in the trial court. Appellant did not contend, at the most obvious

point in the proceedings against him, that he did not understand the charges against him or that the statute was incomprehensible to him. Although he did raise the issue subsequently for the first time in both the appellate courts, the Appellate Term of the State Supreme Court wrote no opinion and the Court of Appeals made no reference to the claim. No application to amend the remittitur was made and so it appears that the question of vagueness was never passed upon by the state courts as it was never properly presented to them. See *People* v. *DeRenzzio*, 19 N. Y. 2d 45 (1966); *People* v. *Friola*, 11 N. Y. 2d 157 (1962). Accordingly, the issue is not properly before this Court. See e.g. *Ker* v. *California*, 374 U. S. 23.

Wholly apart from this, reliance upon this contention is simply a dialectical exercise without any real application to the case before the Court. Appellant's main quarrel is with that portion of the statute which forbids casting contempt by words or act upon the flag. However, it is clear that the New York Court of Appeals construed this act merely as descriptive of the physical act of flag-burning and it is also clear that no New York case contradicts this construction of the statute. Those words, in short, limit rather than expand the meaning of the statute. The relevance of words in general to the statute is simply that they provide evidence of the intent required to impose a criminal sanction. See *State* v. *Schlueter*, 127 N.J.L. 496, 23 A. 2d 249 (N. J. 1941).

In any event, it is clear from the trial record and from the opinion of the Court of Appeals that appellant was convicted for the physical act and not for any words which he might have uttered and that, therefore, the statute is constitutional as applied to him. *Stromberg* v. *California*, 283 U. S. 359.

CONCLUSION

The decision of the Court of Appeals of the State of New York should be affirmed.

Dated: New York, N. Y., October 3, 1968.

Respectfully submitted,

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SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

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Assistant Attorney General
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 5

SIDNEY STREET,

Appellant,

—v.—

PEOPLE OF THE STATE OF NEW YORK,

Appellee.

APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

REPLY BRIEF OF APPELLANT

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No. 5

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APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

REPLY BRIEF OF APPELLANT

Appellant agrees that the scope and purpose of New York's flag desecration statute is as set forth in the brief of the Appellee.

> "In fine, we must protect our country at all times. The anticipation of an attempt to overthrow our basic tenets of democracy by arrogant behavior designed to flout our institutions, and flag burning is such an attempt, must be our prime concern. We cannot afford to experiment by permitting all acts and words denigrating our basic philosophies to freely reach the marketplace of ideas." *Brief of Appellee,* at 80.

The District Attorney confirms the overbroad scope of the statute which was suggested by Appellant in his Brief. *Brief of Appellant,* at 7-8. To the list of hypothetical situ-

ations which would fall within the statute's proscription, we might add, given the District Attorney's opinion that the legislature sought to "condemn the disrespect of a needed and worthy symbol", *Brief of Appellee,* at 85, and to prevent an act which "detracts from the respect one would ordinarily show for the flag", *id.* at 84, a public refusal to pledge allegiance to the flag. *West Virginia Board of Education* v. *Barnett,* 319 U. S. 624 (1943).

The highest law enforcement official in Kings County views the statute as a warrant to suppress certain words or acts which appear in his eyes as "arrogant behavior designed to flout our institutions". *Brief of Appellee,* at 80. The excess to which such a political *lettre de cachet* can lead is regrettably illustrated in *People* v. *Leyva.* In *Leyva* (summons annexed hereto as Exhibit I), a bookstore owner displayed a poster (a copy of which is annexed to this brief as Exhibit II) which a police officer believed violated New York's flag desecration law. The officer seized the offending poster and initiated criminal proceedings against the bookstore owner. The case is currently pending in the New York County Criminal Court.

The *Leyva* case is merely the most recent example of the overbroad application of the New York statute. Demonstrably, it stands as a constant threat to the exercise of robust dissent and must not be permitted to stand.

Respectfully submitted,

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Henry Heggar

Ellen Stekert Mayer

M. Renates Hartogs

Pete Seeger

Paul Wallenstein

Henry Childs

Ellen Siddens

Buckley

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SUMMONS | THE CITY OF NEW YORK POLICE DEPARTMENT | Pct. 24 | Arrest No. 2673 | Serial No. 275

THE PEOPLE OF THE STATE OF NEW YORK VS.

Alfred Leyva — You are hereby summoned to appear

in the Criminal Court of the City of New York, County of New York Part 18, located at

No. 100 Centre St Street on the 14 day of Oct, 1968

at 930 o'clock in the Forenoon, to answer a criminal charge made against you by Plc Flanagan

for violation of 136 Gen Bus Law

Authorized by: Desk Officer Lt Kerwin — Issued by: Police Flanagan — Date 10/3/68

YOU MUST APPEAR AT THE TIME AND DATE INDICATED ABOVE

Should you fail to appear, in addition to a warrant being issued for your arrest, for the offense charged above, you may be charged with violation of Section 205.35 of the Penal Law, Bail Jumping in the Second Degree, a class A Misdemeanor. Class A Misdemeanors are punishable by a term of imprisonment not to exceed one year or, a fine of $1,000 or both.

ACKNOWLEDGEMENT OF DEFENDANT:

I, the undersigned, do hereby acknowledge receipt of the above summons, and do agree to appear as indicated above.

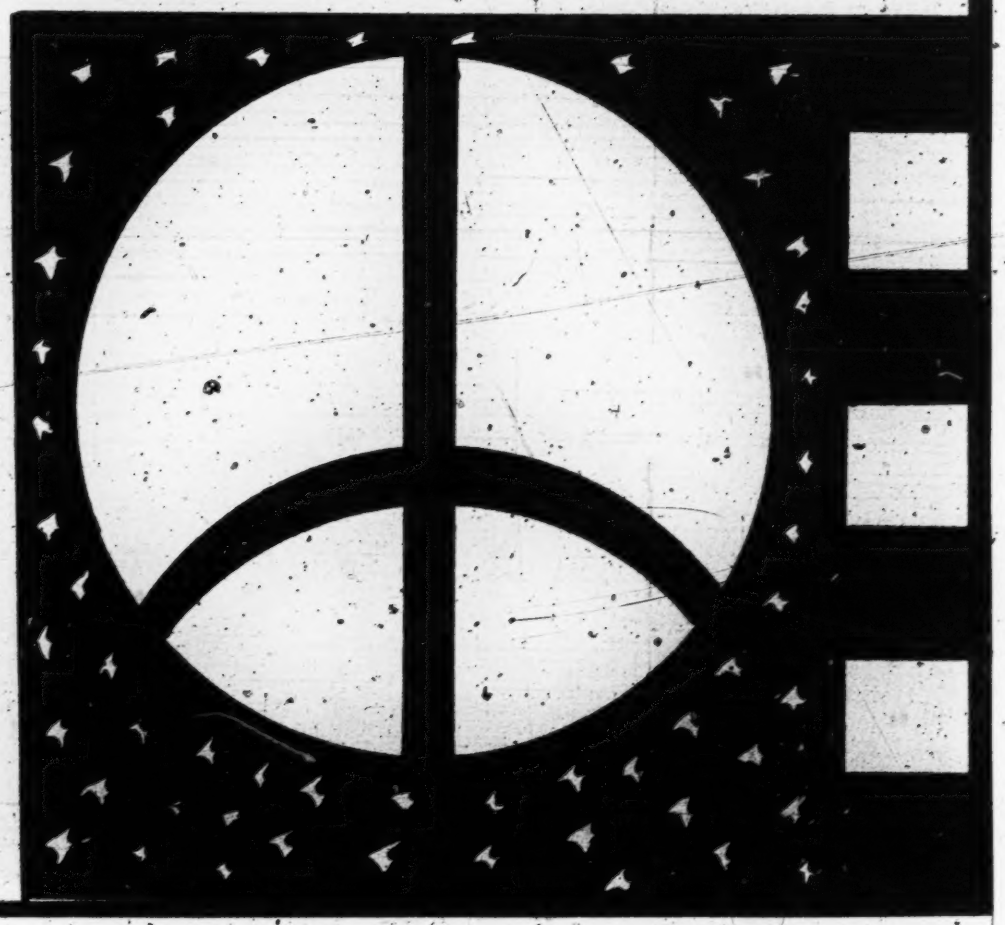
Signature of Defendant Alfred Leyva Time 140 PM Date 10/3/68

Exhibit I

PD 260-121 (1-68)

Exhibit I [SUMMONS] 5

BECAUSE



Rev. Al Carmines
Rev. Howard Moody

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NEW YORK 12, N. Y.

A. Finley Schaef

WASHINGTON SQUARE METHODIST CHURCH
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James Forest
Maggie Golden
Ed Tanny

N. Y. FREE PRESS
200 W. 72 ST.
N. Y., N. Y. 10023

Steve Handelman
Sue Ungaro
Steven Heller
Suzanne Gildens
Jim Buckley

Henry Ca
Judith Mayer

here

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133 WEST 4th STREET
NEW YORK, N. Y. 10012

Karl Bissinger
Gay Merrill
Robert Stern

WAR RESISTERS LEAGUE
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NEW YORK, N. Y. 10038

Richard Shuldiner
Jim Peck
Peter N. Kiger
Nada Cowin Ritter

Jean Hammond
Jack M

Gerald L. Cohen
Elsa J. Illingworth

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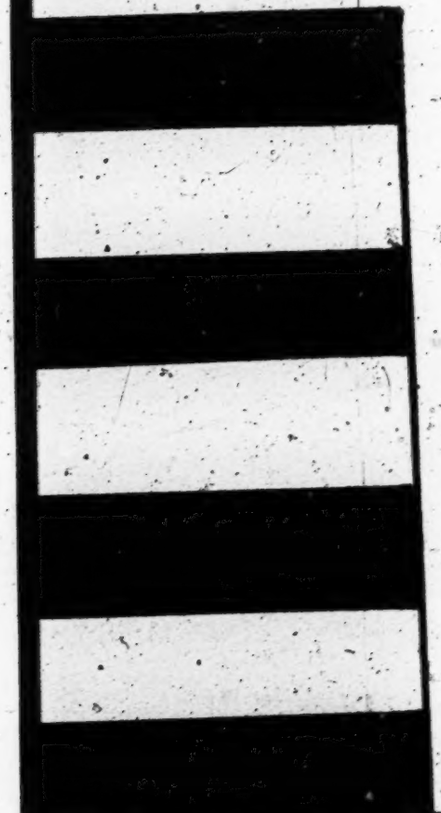
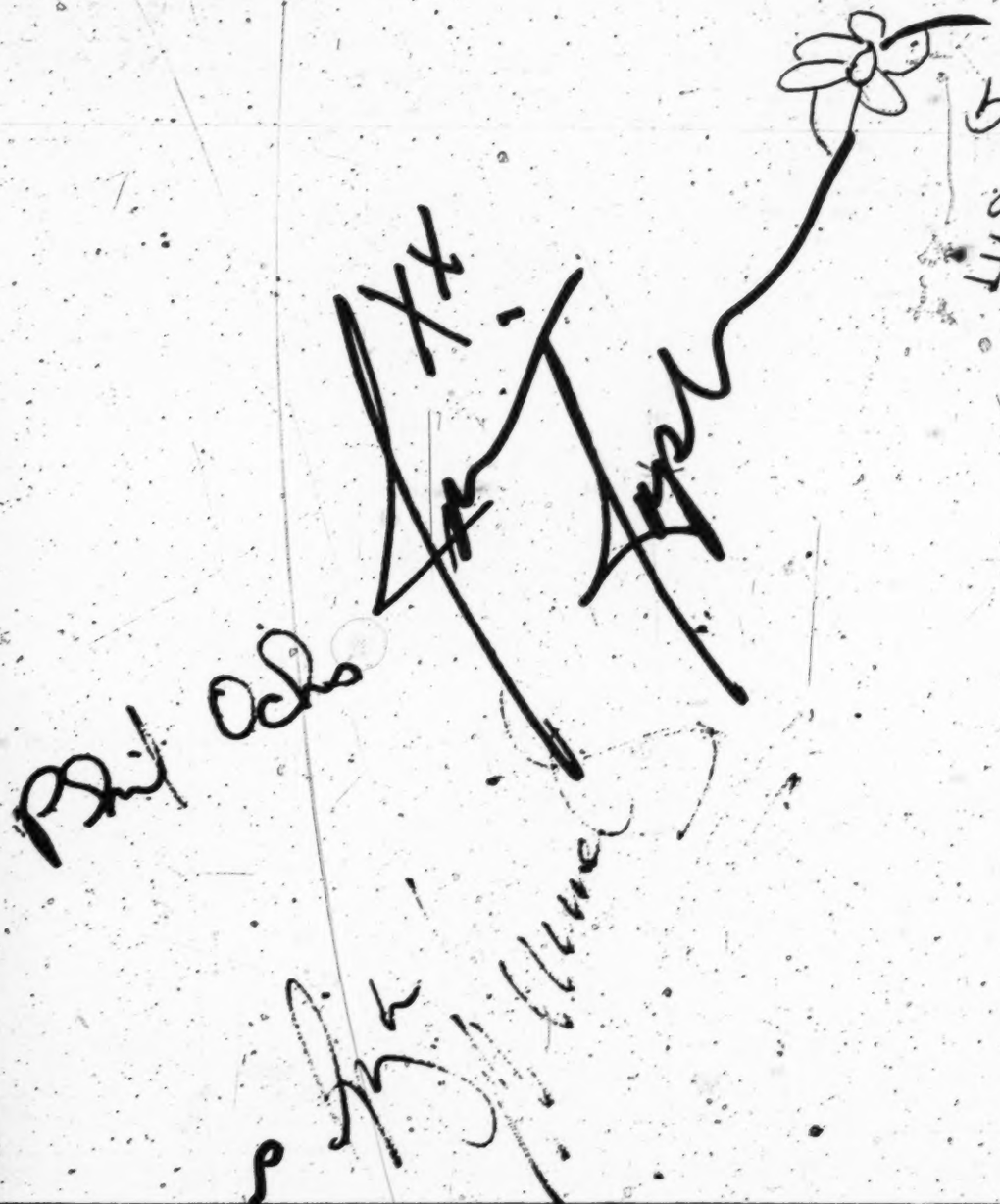




THE WAR

awaiting the day we have a flag of humanity ...

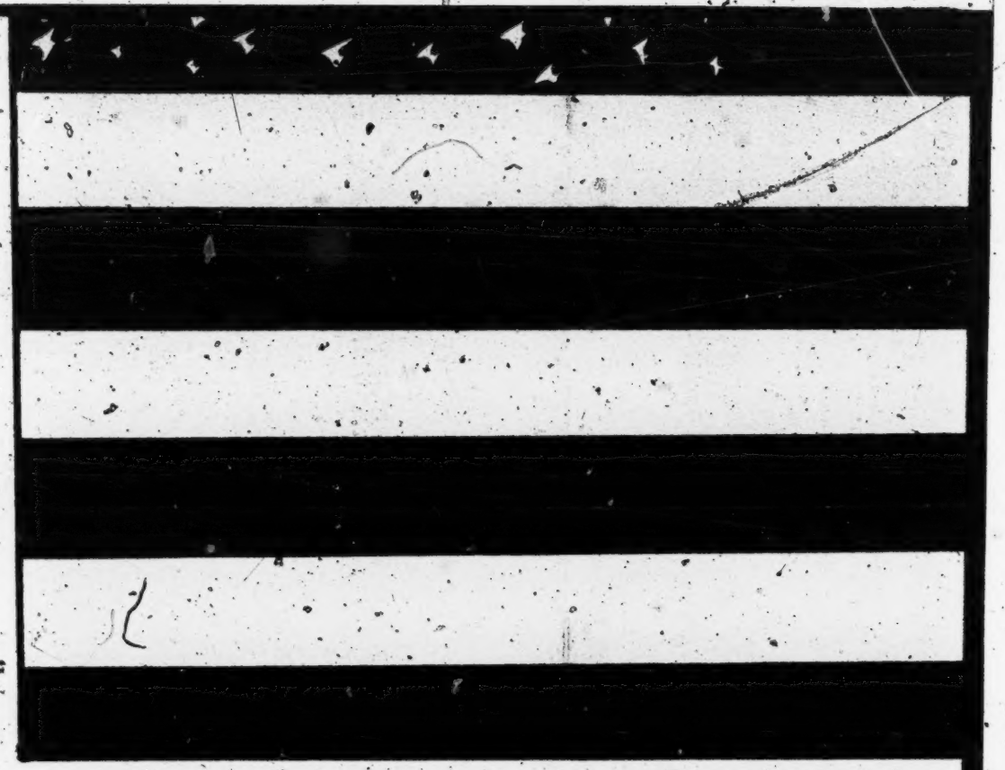
love, Joan Baez

Pat Paulsen

Tom Smothers

Eric Weinberger
Vietnam Peace
Parade Committee
17 E. 17 St., N.Y., N.Y. 10003
Phone (212) 255-1075

Linda Morse
Leonkroy



THE CATHOLIC PEAC
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New York, N. Y.
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Maggie
Ly C

Dave Dellinger
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Rod Robinson
Sydney Hadsell
Clarin Ritter

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NEW YORK,

Karl B
Kay M
Robert

Charles Pitts Kim Deitch
Allen Ansen
Peter Mikalajunas
Ken Jeadner
Fay Fenster
Donna Deitch
M. Rodriguez

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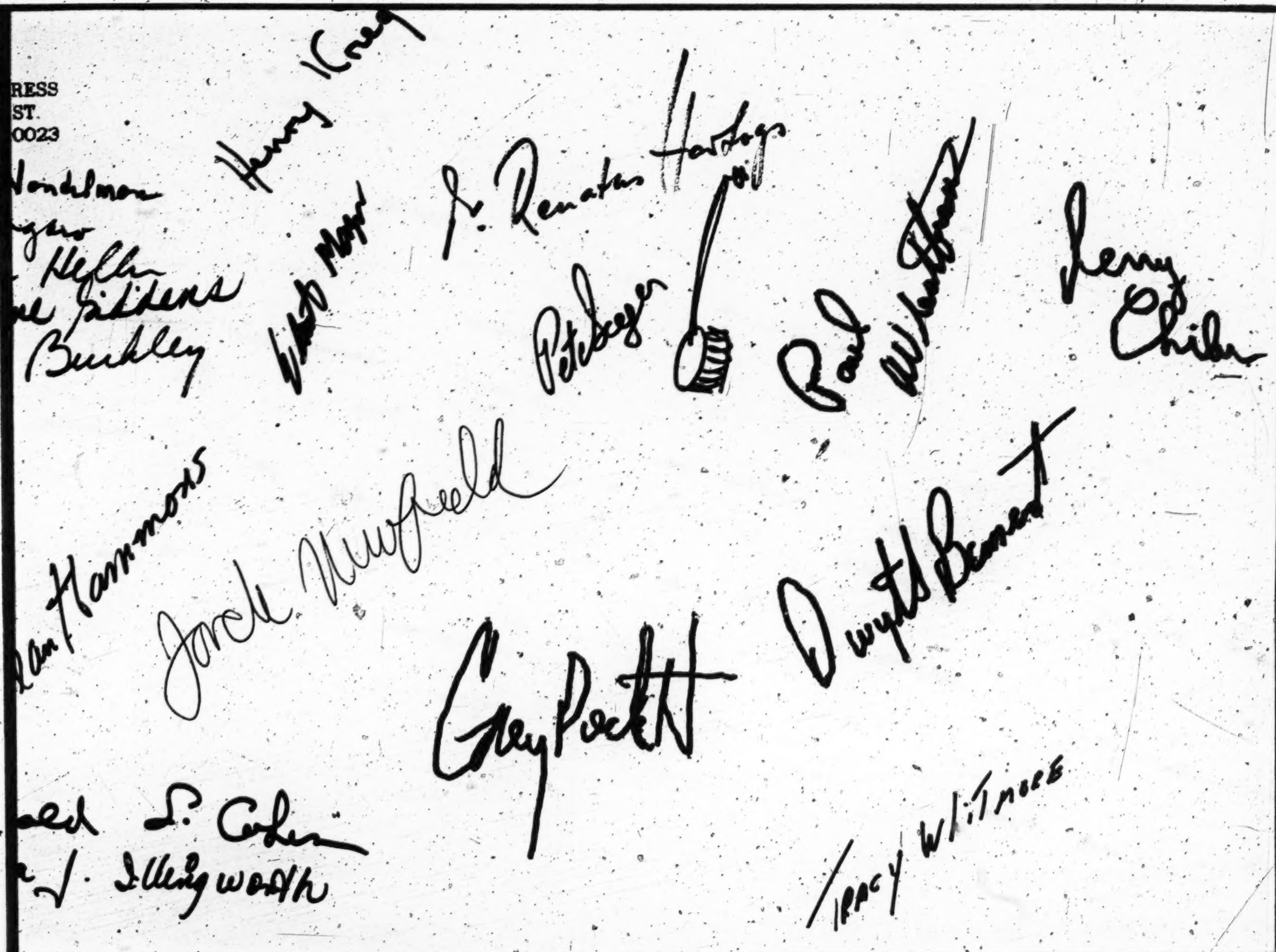
Henry Mancini
Dudley Moore
S. Renata Hartogs
Peter Boyle
Paul Winfield
Henry Chiles
Jack Nicholson
Gregory Peck
Dwight Bennett
Tracy Wiltrout

SUPREME COURT OF THE UNITED STATES

No. 5.—October Term, 1968.

Sidney Street, Appellant, v. State of New York. | On Appeal From the Court of Appeals of New York.

[April 21, 1969.]

Mr. Justice Harlan delivered the opinion of the Court.

Appellant Street has been convicted in the New York courts of violating former § 1425 (16)(d) of the New York Penal Law, which makes it a misdemeanor "publicly [to] mutilate, deface, defile or defy, trample upon or cast contempt upon either by words or act [any flag of the United States]."[1] He was given a suspended sentence. We must decide whether, in light of all the circumstances, that conviction denied to him rights of free expression protected by the First Amendment and assured against state infringement by the Fourteenth Amendment. See *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 269, 271, 276–277 (1964).

According to evidence given at trial, the events which led to the conviction were these. Appellant testified that during the afternoon of June 6, 1966, he was listening to the radio in his Brooklyn apartment. He heard a news report that civil rights leader James Meredith had been shot by a sniper in Mississippi. Saying to himself, "They didn't protect him," appellant, himself a Negro, took from his drawer a neatly folded, 48-star American flag which he formerly had displayed on national holidays. Appellant left his apartment and carried the still-folded flag to the nearby intersection of

[1] N. Y. Penal Law § 1425 (16)(d) (1909). In 1967 § 1425 (16)(d) was superseded by § 136 of the General Business Law, which defines the offense in identical language. See N. Y. Laws, c. 1031, § 52 (1965.)

St. James Place and Lafayette Avenue. Appellant stood on the northeast corner of the intersection, lit the flag with a match, and dropped the flag on the pavement when it began to burn.

Soon thereafter, a police officer halted his patrol car and found the burning flag. The officer testified that he then crossed to the northwest corner of the intersection, where he found appellant "talking out loud" to a small group of persons. The officer estimated that there were some 30 persons on the corner near the flag and five to 10 on the corner with appellant. The officer testified that as he approached within 10 or 15 feet of appellant, he heard appellant say, "We don't need no damn flag," and that when he asked appellant whether he had burned the flag appellant replied: "Yes; that is my flag; I burned it. If they let that happen to Meredith, we don't need an American flag." Appellant admitted making the latter response, but he denied that he said anything else and asserted that he always had remained on the corner with the flag.

Later the same day, appellant was charged, by an information sworn to before a judge of the New York City Criminal Court, with having committed "the crime of Malicious Mischief in that [he] did wilfully and unlawfully defile, cast contempt upon and burn an American Flag, in violation of 1425–16–D of the Penal Law, under the following circumstances: . . . [he] did wilfully and unlawfully set fire to an American Flag and shout, 'If they did that to Meredith, We don't need an American Flag.'"

Appellant was tried before another Criminal Court judge, sitting without a jury, and was convicted of malicious mischief in violation of § 1425 (16)(d).[2] He was subsequently given a suspended sentence. The

[2] Appellant was simultaneously tried for disorderly conduct in connection with the same events. He was acquitted of that offense.

Appellate Division, Second Department, affirmed without opinion. Leave was granted to appeal to the New York Court of Appeals, and after plenary consideration that court unanimously affirmed. 20 N. Y. 2d 231, 229 N. E. 2d 187 (1967). We noted probable jurisdiction. 392 U. S. 923 (1968).[3]

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[3] At one stage of the proceedings in this Court, the State moved for dismissal on the ground that we lacked jurisdiction over this appeal because the case was moot. The State pointed out that appellant received a suspended sentence, and that the one-year period within which the suspended sentence might have been replaced with a prison sentence under New York law had expired. It further asserted that there were no significant collateral consequences under either New York or federal law. In response, appellant stated that his employer, the New York Transit Authority, had instituted disciplinary proceedings against him as a result of his conviction. Appellant was charged with "misconduct," and according to Transit Authority rules he may be punished by a fine of up to $100 or suspension without pay for up to two months if the still-pending charges are finally sustained. Appellant also noted that §§ 393 (c), 482, and 510 of the New York Code of Criminal Procedure provide respectively that his conviction may be used to rebut any character evidence adduced by him in future criminal proceedings; that a record of his conviction must be made available to the judge prior to imposition of any future criminal sentence; and that if convicted of a felony he may now be sentenced as a "habitual criminal."

Only last Term, this Court held in *Ginsberg* v. *New York*, 390 U. S. 629, 633, n. 2 (1968), that the case of a New York appellant was not moot even though the time for revocation of his suspended sentence had expired, because it was possible that his license to operate a luncheonette might be withdrawn in consequence of his conviction. Here there is an actual rather than merely a potential threat that appellant will be deprived of his employment, albeit only temporarily. This Court also held last Term, in *Sibron* v. *New York*, 392 U. S. 40, 50–58 (1968), that the case of a New York appellant who had fully served his misdemeanor sentence was not moot because he apparently could not have brought his case to this Court before completion of his sentence and because the conviction could be used for impeachment and sentencing purposes in future criminal proceedings. Appellant Street similarly was unable, despite

Street argues that his conviction was unconstitutional for three different reasons. *First*, he claims that § 1425 (16)(d) is overbroad, both on its face and as applied, because the section makes it a crime "publicly [to] defy . . . or cast contempt upon [an American flag] *by words* . . . ." (Emphasis added.) *Second*, he contends that § 1425 (16)(d) is vague and imprecise because it does not clearly define the conduct which it forbids. *Third*, he asserts that New York may not constitutionally punish one who publicly destroys or damages an American flag as a means of protest, because such an act constitutes expression protected by the Fourteenth Amendment. We deem it unnecessary to consider the latter two arguments, for we hold that § 1425 (16)(d) was unconstitutionally applied in appellant's case because it permitted him to be punished merely for speaking defiant or contemptuous words about the American flag. In taking this course, we resist the pulls to decide the constitutional issues involved in this case on a broader basis than the record before us imperatively requires.

Though our conclusion is a narrow one, it requires pursuit of four lines of inquiry: (1) whether the constitutionality of the "words" part of the statute was passed upon by the New York Court of Appeals; (2) whether, if appellant's conviction may have rested in whole or in part on his utterances and if the statute as thus applied is unconstitutional, these factors in themselves require reversal; (3) whether Street's words may in fact have counted independently in his conviction; and (4) whether the "words" provision of the statute, as presented by this case, is unconstitutional.

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diligent prosecution of his appeals, to bring his case here within a year of his sentencing. He is subject to all of the collateral penalties to which Sibron was liable. Hence, both *Ginsberg* and *Sibron* dictate that this case is not moot.

I.

The New York Court of Appeals did not mention in its opinion the constitutionality of the "words" part of § 1425 (16)(d).[4] Hence, in order to vindicate our jurisdiction to deal with this particular issue, we must inquire whether that question was presented to the New York courts in such a manner that it was necessarily decided by the New York Court of Appeals when it affirmed appellant's conviction. If the question was not so presented, then we have no power to consider it. See 28 U. S. C. §§ 1257 (2), 1257 (3); *Bailey* v. *Anderson*, 326 U. S. 203, 206–207 (1945). Moreover, this Court has stated that when, as here, the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary. See, *e. g.*, *Bailey* v. *Anderson*, *supra*; *Chicago, I. & L. R. Co.* v. *McGuire*, 196 U. S. 128, 131–133 (1905).

In this case, any want of presentation by the appellant must have occurred at the trial level, for there appears to be no doubt that the issue of the constitutionality of the "words" part of the statute was raised in appellant's briefs in both the Appellate Division and the Court of Appeals, and the State does not suggest the contrary. In the trial court, appellant's counsel raised the constitutional issues by means of the following motion:

> "Before we plead to this case, I would like to make a motion to dismiss the information upon the following grounds: The defendant was engaged in

[4] Also, we are unable to read the opinion of the Court of Appeals as reading the "words" clause out of the statute and authoritatively construing it to reach only the *act* of flag burning, whether as a protest or otherwise.

> a constitutionally protected activity, to wit, freedom of speech. The allegation simply says that the defendant did wilfully and unlawfully set fire to an American flag and did say: 'If they did that to Meredith we don't need an American flag.' Under the first amendment of the Constitution of the United States and under the New York State Constitution they provide for protest in many forms, whether by burning a flag, demonstration or picketing. This is a form of demonstration and protest."

The motion was denied. It was renewed at the end of the State's case and at the end of the trial, and on both occasions was again denied.

The issue whether a federal question was sufficiently and properly raised in the state courts is itself ultimately a federal question, as to which this Court is not bound by the decision of the state courts.[5] However, it is not entirely clear whether in such cases the scope of our review is limited to determining whether the state court has "by-passed the federal right under forms of local procedure" or whether we should decide the matter "*de novo* for ourselves." *Ellis* v. *Dixon*, 349 U. S. 458, 463 (1955). In either event, we think appellant has met the burden of showing that the issue of the constitutionality of the "words" part of § 1425 (16) (d) was adequately raised in the state trial court. The motion quoted above explicitly referred to appellant's words. Appellant's counsel termed appellant's overall activity a "demonstration" or "protest," terms which encompass words as well as conduct. Indeed, if appellant's inten-

[5] See, *e. g.*, *Parker* v. *Illinois*, 333 U. S. 571, 574 (1948); *Carter* v. *Texas*, 177 U. S. 442, 447 (1900); R. Robertson & F. Kirkham, Jurisdiction of the Supreme Court of the United States, § 63.1, at 112 & n. 1 (Wolfson & Kurland ed. 1951), and other cases there cited.

tion was to protest alleged governmental inaction in connection with the shooting of James Meredith, his words were an essential element, for without them no one would have known the object of his protest.

To the extent that the matter is governed by New York law, we have found no New York statutes or decisions which require that an issue be raised in the trial court with greater specificity than occurred here. In fact, in *People* v. *McLucas*, 15 N. Y. 2d 167, 172, 204 N. E. 2d 846, 848 (1965), the New York Court of Appeals held that when an appellant claims "deprivation of a fundamental constitutional right" New York appellate courts may review the correctness of a jury charge even though the appellant failed to except to the charge in the trial court. The Court of Appeals reached this result despite the fact that § 420–a of the New York Code of Criminal Procedure then required that an exception be taken "expressly" if the issue of the correctness of a jury charge was to be preserved for appellate review. In the present case, the right asserted by appellant was surely "fundamental," and under New York law a less precise objection was required than to a jury instruction.[6]

Insofar as the question of sufficient presentation is one for our independent decision, the controlling principle was set forth in the leading case of *New York ex rel. Bryant* v. *Zimmerman*, 278 U. S. 63, 67 (1928):

> "There are various ways in which the validity of a state statute may be drawn in question on the

[6] At the time of appellant's trial, § 420–a of the New York Code of Criminal Procedure provided that with respect to trial rulings other than jury instructions:

"An exception shall be deemed to have been taken by the party adversely affected to every ruling before or after the cause is finally submitted, when such party, at the time when such ruling is sought or made, makes known to the court or judge his position thereon by objection or otherwise."

> ground that it is repugnant to the Constitution of the United States. No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented." (Footnote omitted.)

We think this requirement was satisfied by appellant's previously quoted motion in the trial court and his raising of the issue in the two appellate courts.[1] We therefore conclude that the question is properly before us.

II.

We next consider whether it is our duty to reverse if we find, as we do in Parts III and IV, *infra*, that Street's words could have been an independent cause of his conviction and that a conviction for uttering such words would violate the Constitution.

That such is our duty is made apparent by a number of decisions of this Court. In the leading case of *Stromberg* v. *California*, 283 U. S. 359 (1931), the appellant was convicted by a jury under a California statute making it an offense publicly to display a red flag for any one of three purposes. Finding that it would be

[1] We find unpersuasive the State's argument that appellant's omission to raise the question of the constitutionality of the "words" provision is shown by his failure at any stage to invoke the exclusionary rule of *Miranda* v. *Arizona*, 384 U. S. 436 (1966), with respect to the admission of his words into evidence. For the State concedes that appellant's words were probative at least with respect to his unlawful intent in burning the flag, see Brief for Appellees 45–46, and appellant therefore would have had reason to invoke *Miranda* even had he believed the "words" part of the statute to be irrelevant.

unconstitutional to punish one who displayed for the first-named reason, this Court rejected the state court's reasoning that the appellant's conviction could nevertheless be sustained because the other two statutory reasons were severable and constitutional. This Court said:

> "The verdict against the appellant was a general one. It did not specify the ground upon which it rested. . . . [I]t is impossible to say under which clause of the statute the conviction was obtained. If any one of these . . . clauses was invalid, it cannot be determined upon this record that the appellant was not convicted under that clause . . . . It follows that . . . the conviction cannot be upheld." *Id.*, at 367–368.

The principle established in *Stromberg* has been consistently followed. In *Williams* v. *North Carolina*, 317 U. S. 287 (1942), this Court again held itself compelled to reverse a conviction based upon a general jury verdict when the record failed to prove that the conviction was not founded upon a theory which could not constitutionally support a verdict. The Court stated:

> "To say that a general verdict of guilty should be upheld though we cannot know that it did not rest on the invalid constitutional ground . . . would be to countenance a procedure which would cause a serious impairment of constitutional rights." *Id.*, at 292.

The rule was again applied in *Cramer* v. *United States*, 325 U. S. 1, 36, n. 45 (1945); *Terminiello* v. *Chicago*, 337 U. S. 1, 5–6 (1949), and *Yates* v. *United States*, 354 U. S. 298, 311 (1957).

It is true that in the present case the general verdict was rendered by a judge, not a jury. However, if the ground of the judge's decision cannot be ascertained

from the record, then the danger of unconstitutional conviction is not significantly less than in the cases just discussed. Cf. *Thomas* v. *Collins*, 323 U. S. 516, 528–529 (1945). Nor would it be appropriate to remand the case to the trial judge for a *post hoc* explanation of the grounds of his decision. Cf. *Greyhound Lines* v. *Mealey*, 334 U. S. 653, 655 (1948). Hence, we conclude that the case is governed by the rule of *Stromberg*, and that appellant's conviction must be set aside if we find that it could have been based solely upon his words and that a conviction resting on such a basis would be unconstitutional—a matter to which we shall turn in a moment.

Moreover, even assuming that the record precludes the inference that appellant's conviction might have been based *solely* on his words, we are still bound to reverse if the conviction could have been based upon *both* his words and his act. This is made apparent by *Thomas* v. *Collins*, *supra*. The Court in that case noted that Thomas had been cited for contempt because during a meeting he allegedly had violated a court restraining order both by soliciting a single individual to join a union and by soliciting all nonunion men present. The Court found it unnecessary to consider the State's contention that the judgment could be sustained on the basis of the individual solicitation alone. The Court said:

> "The motion for the fiat in contempt was filed and the fiat itself was issued on account of both invitations. The order adjudging Thomas in contempt was in general terms, finding that he had violated the restraining order without distinction between the solicitations set forth in the petition and proved as violations. The sentence was a single penalty. In this state of the record it must be taken that the order followed the prayer of the motion and the fiat's

recital, and that the penalty was imposed on account of both violations. The judgment therefore must be affirmed as to both or as to neither. Cf. *Williams* v. *North Carolina*, 317 U. S. 287, 292; *Stromberg* v. *California*, 283 U. S. 359, 368." 323 U. S., at 528–529. (Footnotes omitted.)

Finding that a conviction based upon the general solicitation could not stand, the Court reversed the entire conviction.[8]

As in *Thomas*, appellant here was charged with two acts violative of the statute: burning a flag and publicly speaking defiant or contemptuous words about the flag; and evidence was introduced to show the commission of both acts. Here too the verdict was general and the sentence a single penalty. Hence, unless the record negates the possibility that the conviction was based on both alleged violations, *Thomas* dictates that "[t]he judgment . . . must be affirmed as to both or as to neither."

We take the rationale of *Thomas* to be that when a single-count indictment or information charges the commission of a crime by virtue of having done both a constitutionally protected act and one which may be unprotected, and a guilty verdict ensues without elucidation, there is an unacceptable danger that the trier of fact will have regarded the two acts as "intertwined" and have rested the conviction on both together. See 323 U. S., at 528–529, 540–541. There is no comparable hazard when the indictment or information is in several

[8] There can be no doubt that the Court's disposition in *Thomas*, including its decision to reverse the conviction and not simply to remand for resentencing, was carefully considered. The case was originally argued during the 1943 Term but was ordered to be restored to the docket and reargued the following Term, with the parties directed to brief, *inter alia*, the question whether the general solicitation was a basis of Thomas' conviction.

counts and the conviction is explicitly declared to rest on findings of guilt on certain of those counts,[9] for in such instances there is positive evidence that the trier of fact considered each count on its own merits and separately from the others.

III.

We turn to considering whether appellant's words could have been the sole cause of his conviction, or whether the conviction could have been based on both his words and his burning of the flag. As *Stromberg* teaches, we cannot take the opinion of the New York Court of Appeals as obviating our duty to examine the record for ourselves in order to ascertain whether the conviction may have rested upon such grounds. The sworn information which charged appellant with the crime of malicious mischief, and which is quoted more fully *supra*, at 2, recited not only that appellant had burned an American flag but also that he "[did] shout, 'If they did that to Meredith, We don't need an American flag.'" Section 1425 (16)(d), the statute which appellant was charged with violating, made it a crime not only publicly to mutilate a flag but also "publicly [to] defy . . . or cast contempt upon [any American flag] by words."

The State argues that appellant's words were at most used to establish his unlawful intent in burning the flag.[10] However, after a careful examination of the com-

[9] See, *e. g.*, *Claassen* v. *United States*, 142 U. S. 140 (1891); *Pinkerton* v. *United States*, 328 U. S. 640 (1946); *Barenblatt* v. *United States*, 360 U. S. 109 (1959).

[10] The State also contends that appellant's words could not have been a ground of conviction because they obviously were not spoken "publicly," as required by § 1425 (16)(d). However, although appellant testified that he spoke solely to a police officer, the officer himself gave evidence from which the trial judge might have concluded that appellant's remarks were made either to or within hearing of a small crowd. See p. 2, *supra*. Moreover, the

paratively brief trial record, we find ourselves unable to say with certainty that appellant's words were not an independent cause of his conviction. While it is true that at trial greater emphasis was placed upon appellant's action in burning the flag than upon his words, a police officer did testify to the utterance of the words. The State never announced that it was relying exclusively upon the burning. The trial judge never indicated during the trial that he regarded appellant's words as relating solely to intent. The judge found appellant guilty immediately after the end of the trial, and he delivered no oral or written opinion.

In the face of an information explicitly setting forth appellant's words as an element of his alleged crime, and of appellant's subsequent conviction under a statute making it an offense to speak words of that sort, we find this record insufficient to eliminate the possibility either that appellant's words were the sole basis of his conviction or that appellant was convicted for both his words and his deed.

IV.

We come finally to the question whether, in the circumstances of this case, New York may constitutionally inflict criminal punishment upon one who ventures "publicly [to] defy . . . or cast contempt upon [any American flag] by words . . . ."

The relevant evidence introduced at appellant's trial, considered in the light most favorable to the State,

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sworn information recited that appellant "shout[ed]" his words on a city street, thereby apparently satisfying the statutory requirement that the words be said "publicly."

Nor do we think it impossible for the trial judge to have found that by his statements, "We don't need no damn flag" and "If they let that happen to Meredith we don't need an American flag," appellant "def[ied] . . . or cast contempt upon [an American flag] by words" in violation of § 1425 (16) (d).

must be taken to establish the following. At the time of his arrest, appellant was standing on a street corner and speaking to a small crowd; on the opposite corner lay the burning flag. Appellant said to the crowd: "We don't need no damn flag"; and when questioned by a police officer appellant stated: "If they let that happen to Meredith, we don't need an American flag." According to the officer, the crowds which gathered around appellant and around the flag did not obstruct the street or sidewalk and were neither unruly nor threatening.

In these circumstances, we can think of four governmental interests which might conceivably have been furthered by punishing appellant for his words: (1) an interest in deterring appellant from vocally inciting others to commit unlawful acts; (2) an interest in preventing appellant from uttering words so inflammatory that they would provoke others to retaliate physically against him, thereby causing a breach of the peace; (3) an interest in protecting the sensibilities of passers-by who might be shocked by appellant's words about the American flag; and (4) an interest in assuring that appellant, regardless of the impact of his words upon others, showed proper respect for our national emblem.

In the circumstances of this case, we do not believe that any of these interests may constitutionally justify appellant's conviction under § 1425 (16)(d) for speaking as he did. We begin with the interest in preventing incitement. Appellant's words, taken alone, did not urge anyone to do anything unlawful. They amounted only to somewhat excited public advocacy of the idea that the United States should abandon, at least temporarily, one of its national symbols. It is clear that the Fourteenth Amendment prohibits the States from imposing criminal punishment for public advocacy of peaceful change in our institutions. See, *e. g.*, *Cox* v. *Louisiana* (*I*), 379 U. S. 536, 546–552 (1965); *Edwards* v. *South Carolina*,

372 U. S. 229, 237–238 (1963); *Terminiello* v. *Chicago*, 337 U. S. 1, 4–5 (1949); cf. *Yates* v. *United States*, 354 U. S. 298, 318–319 (1957). Even assuming that appellant's words might be found incitive when considered together with his simultaneous burning of the flag, § 1425 (16)(d) does not purport to punish only those defiant or contemptuous words which amount to incitement, and there is no evidence that the state courts regarded the statute as so limited. Hence, a conviction for words could not be upheld on this basis. See, *e. g.*, *Yates* v. *United States*, *supra*; *Terminiello* v. *Chicago*, *supra*.

Nor could such a conviction be justified on the second ground mentioned above: the possible tendency of appellant's words to provoke violent retaliation. Though it is conceivable that some listeners might have been moved to retaliate upon hearing appellant's disrespectful words, we cannot say that appellant's remarks were so inherently inflammatory as to come within that small class of "fighting words" which are "likely to provoke the average person to retaliation, and thereby cause a breach of the peace." *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 574 (1942). And even if appellant's words might be found within that category, § 1425 (16)(d) is not narrowly drawn to punish only words of that character, and there is no indication that it was so interpreted by the state courts. Hence, this case is again distinguishable from *Chaplinsky*, *supra*, in which the Court emphasized that the statute was "narrowly drawn so as not unduly to impair liberty of expression . . . ." *Id.*, at 574. See also *Terminiello* v. *Chicago*, *supra*.

Again, such a conviction could not be sustained on the ground that appellant's words were likely to shock passers-by. Except perhaps for appellant's incidental use of the word "damn," upon which no emphasis was

placed at trial,[11] any shock effect of appellant's speech must be attributed to the content of the ideas expressed. It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers. See, *e. g.*, *Cox* v. *Louisiana* (*I*), *supra*; *Edwards* v. *South Carolina*, *supra*; *Terminiello* v. *Chicago*, *supra*; cf. *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940). And even if such a conviction might be upheld on the ground of "shock," there is again no indication that the state courts regarded the statute as limited to that purpose.

Finally, such a conviction could not be supported on the theory that by making the above-quoted remarks about the flag appellant failed to show the respect for our national symbol which may properly be demanded of every citizen. In *Board of Educ.* v. *Barnette*, 319 U. S. 624 (1943), this Court held that to require unwilling schoolchildren to salute the flag would violate rights of free expression assured by the Fourteenth Amendment. In his opinion for the Court, Mr. Justice Jackson wrote words which are especially apposite here:

> "The case is made difficult not because the principles of its decision are obscure but because the flag involved is our own. Nevertheless, we apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate social organization. . . . [F]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.
>
> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can

[11] The State admits that there was only a "single and casual reference to this statement at the trial . . . ." Brief for Appellees 45.

> prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us." *Id.*, at 641–642. (Footnote omitted.)

We have no doubt that the constitutionally guaranteed "freedom to be intellectually . . . diverse and even contrary," and the "right to differ as to things that touch the heart of the existing order," encompass the freedom to express publicly one's opinions about our flag, including those opinions which are defiant or contemptuous.

Since appellant could not constitutionally be punished under § 1425 (16)(d) for his speech, and since we have found that he may have been so punished, his conviction cannot be permitted to stand. In so holding, we reiterate that we have no occasion to pass upon the validity of this conviction insofar as it was sustained by the state courts on the basis that Street could be punished for his burning of the flag, even though the burning was an act of protest. Nor do we perceive any basis for our Brother WHITE's fears that our decision today may be taken to require reversal whenever a defendant is convicted for burning a flag in protest, following a trial at which his words have been introduced to prove some element of that offense. Assuming that such a conviction would otherwise pass constitutional muster, a matter about which we express no view, nothing in this opinion would render the conviction impermissible merely because an element of the crime was proved by the defendant's words rather than in some other way. See *United States* v. *O'Brien*, 391 U. S. 367, 369–370, 376–377 (1968).

We add that disrespect for our flag is to be deplored no less in these vexed times than in calmer periods of our history. Cf. *Halter* v. *Nebraska*, 205 U. S. 34 (1907).

Nevertheless, we are unable to sustain a conviction that may have rested on a form of expression, however distasteful, which the Constitution tolerates and protects.

For the reasons previously set forth, we reverse the judgment of the New York Court of Appeals and remand the case for further proceedings not inconsistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 5.—October Term, 1968.

Sidney Street, Appellant, v. State of New York. | On Appeal From the Court of Appeals of New York.

[April 21, 1969.]

Mr. Chief Justice Warren, dissenting.

I dissent from the reversal of this judgment, not only because the Court in my opinion has strained to bring this trial within *Stromberg* v. *California*, 283 U. S. 359 (1931), but more particularly because it has declined to meet and resolve the basic question presented in the case. That question has been variously stated by the New York Court of Appeals and the parties. The court below employed the following statment of the question:

> "We are called upon to decide whether the deliberate act of burning an American flag in public as a 'protest' may be punished as a crime." [1]

Appellant tells us that the issue presented is:

> "May New York State constitutionally impose penal sanctions upon an individual charged with destroying or damaging an American flag in an attempt to dramatize his concern with social conditions existing in the country?" [2]

New York's statement of the issue is identical:

> "May the State of New York constitutionally impose penal sanctions upon one who is charged with

[1] *People* v. *Street*, 20 N. Y. 2d 231, 234, 229 N. E. 2d 187, 189, 282 N. Y. S. 2d 491, 493 (1967).

[2] Appellant's brief, at 2. Appellant also suggests that the New York statute is unconstitutionally vague. The Court does not deal with this issue, nor do I.

publicly and deliberately desecrating an American flag as a means of dramatizing his dissatisfaction with social conditions existing within our Country?"[3]

Any distinctions between the above questions are without a significant difference. The parties obviously believe that the constitutionality of flag desecration statutes is before the Court. The question posed by the Court of Appeals is the most succinct. Chief Judge Fuld, writing for a unanimous Court of Appeals, answered the question squarely; we should do likewise if we are to meet our responsibility. But the Court specifically refuses to decide this issue. Instead, it searches microscopically for the opportunity to decide the case on the peripheral *Stromberg* ground, holding that it is impossible to determine the basis for appellant's conviction. In my opinion a reading of the short trial record leaves no doubt that appellant was convicted solely for burning the American flag.

I.

From the beginning to the end of the proceedings below the parties placed only two matters in issue: (1) is burning the flag protected symbolic speech and (2) did appellant burn the flag for the purpose of casting contempt upon it or did he burn it in a dignified manner?[4] The information alleged that "Sidney Street did commit the crime of Malicious Mischief in that the defendant did wilfully and unlawfully defile, cast contempt upon and burn an American Flag, in violation of 1425–16–D of the Penal Law, under the following circumstances: On the aforesaid date, place and time, the defendant did wilfully and unlawfully set fire to an American Flag and shout, 'If they did that to Meredith, We don't

[3] Appellee's brief, at 5.

[4] The Appendix to this opinion reproduces in full those portions of the trial record which have any conceivable bearing upon the basis for the verdict.

need an American Flag.'" Although the Court stresses the mention of appellant's words in the information as indicative that he was convicted for uttering these words, the trial proceedings demonstrate that the words were employed only to show appellant's purpose for burning the flag.

At the outset of the trial appellant's counsel moved to dismiss the indictment, clearly revealing the theory of appellant's defense that flag burning is constitutionally protected and that appellant burned the flag in a dignified manner.

> "Mr. Goldstick [appellant's counsel]: 'Before we plead to this case I would like to make a motion to dismiss the information upon the ground it does not state facts to constitute a crime on the following grounds: The defendant was engaged in a constitutionally protected activity, to wit, freedom of speech. The allegation simply says that the defendant did wilfully and unlawfully set fire to an American flag and did say: "If they did that to Meredith we don't need an American flag." Under the first amendment of the Constitution of the United States and under the New York State constitution on freedom of speech they provide for protest in many forms, whether it be by *burning a flag*, demonstration or picketing. This is a form of demonstration and protest.'
>
> "Court: 'You say *burning the flag* is a form of demonstration?'
>
> "Mr. Goldstick: 'Yes.'
>
> "Court: 'Motion denied.'
>
> "Mr. Goldstick: 'Also, there is a Federal statute which provides for *burning the flag*. I refer Your Honor—'
>
> "Court, interposing: 'So does Section 1425 provide for the lawful disposition of a flag!'

"Mr. Goldstick, continuing: 'I refer Your Honor to page 6 of my brief, referring to the United States Code that a flag, when it is in such a condition that it is no longer a fitting emblem for display, should be destroyed in a dignified way, preferably by *burning*.

"'Now, under the supremacy clause, if there is any conflict with any statute the Federal statute takes precedence; if a State law is in conflict with a Federal law the Federal law takes precedence. The Federal law provides you may *burn* an American flag; therefore, New York State is without power to make a complaint and convict a man for the *burning* of an American flag.'

"Court: 'Motions denied. The question here would be whether he *burned* it because it was in such poor condition that it should be *burned*, or if it was an illegal demonstration.'" (Emphasis added).

Defense counsel insisted that burning the flag, an act he equated with a demonstration or picketing, was a form of speech for which his client could not be constitutionally punished. His colloquy with the trial judge does not give even the slightest suggestion that appellant was being prosecuted for words he might have spoken. That defense counsel believed that appellant's act, not his words, was at issue is further demonstrated by counsel's pre-emption argument. The federal statute to which counsel referred, 36 U. S. C. § 176 (j), concerns the manner in which the flag is to be displayed and mandates that the flag, when no longer a fitting emblem for display, should be destroyed in a dignified way, preferably by burning. At the time of appellant's trial the federal prohibition of flag desecration, which is all material particulars was identical to New York's, applied only to

the District of Columbia and could therefore not have pre-empted state legislation on the same subject.[5]

The trial testimony confirms my belief that appellant's act was the sole basis for the verdict as it contains nothing to suggest that either the parties or the trial judge believed that appellant was on trial for his words. The arresting officer testified that, as he was investigating the source of a fire, he heard appellant say, "We don't need no damn flag." The officer then asked appellant whether he was responsible for the burning of the flag; appellant replied that he was and that "If they let that happen to Meredith we don't need an American flag." The officer's testimony concluded with a description of the number of people in the vicinity and the extinguishing of the fire. During cross-examination of the officer, defense counsel asked not one question concerning what, if anything, appellant said.

Appellant did not dispute the prosecution's version of the facts. He testified that, hearing the news report of Meredith's shooting, he removed a flag from his dresser drawer, walked to the corner of St. James Place and Lafayette Avenue and burned the flag. According to appellant, he made no remarks to the crowd that had gathered and his reference to Meredith was made to the police officer. Cross-examination by the prosecution explored appellant's motivation for burning the flag; no mention was made of words appellant might have spoken.

We are told by the Court that at least in part appellant's conviction rests on his words. If it does, the trial record is strangely silent, for the State made no

[5] See 4 U. S. C. § 3 (1964 ed.). Federal legislation enacting flag desecration prohibitions on a national scope was not passed until July 5, 1968, two years after appellant's trial. This legislation specifically does not pre-empt state flag burning statutes. See 82 Stat. 291, 18 U. S. C. § 700 (c).

attempt to prove that appellant's words were heard by the crowd. Appellant insisted that he spoke only to the officer, yet the New York statute requires that the accused's flag desecration be public. The State argues, without contradiction by appellant, that words spoken to a policeman would not be spoken publicly for purposes of the statute.[6] I think it evident that appellant's words were mentioned in the indictment and introduced at trial only to show that he burned the flag with an intent to desecrate it, a necessary element of the State's case. In the absence of such evidence, the State would have proven that appellant burned a flag but have left open the possibility that the burning was designed to destroy it in a dignified manner. The fact that appellant's words supplied an element of the State's case does not mean that he was convicted for uttering these words. See *Giboney* v. *Empire Storage & Ice Co.*, 336 U. S. 490, 498 (1949).

Neither the prosecution nor the defense nor the New York courts attached any independent significance to his words. To interpret this record in any other manner ignores the very basic fact that the trial judge and the parties thought that there was one issue in this trial—whether appellant could be criminally punished for burning the flag. This record is not sufficiently ambiguous to justify the Court's speculation that the verdict below might rest even in part upon a conviction for appellant's words.

II.

I do not believe that the *Stromberg* line of cases allows us to avoid deciding whether flag burning is protected

[6] It appears that the New York courts would so construe their legislation. See *People* v. *LaSister*, 9 Misc. 2d 518, 170 N. Y. S. 2d 702 (Ct. Spec. Sess. 1958); cf. *State* v. *Peacock*, 138 Me. 339, 25 A. 2d 491 (1942).

by the First Amendment. This case does not fit the *Stromberg* mold.

Miss Stromberg was one of the supervisors of a children's summer camp. She directed a daily ceremony during which the children raised the Soviet flag and recited a pledge of allegiance "to the worker's red flag." A California statute made it a criminal offense for any person to display a red flag (1) as a symbol of opposition to organized government or (2) as an invitation to anarchistic action or (3) as an aid to propaganda of a seditious character. The trial judge, following the express terms of the statute, charged that Miss Stromberg could be convicted if she displayed a red flag for any one of the three prohibited purposes. The Court first determined that a criminal conviction for display of a red flag as a symbol of opposition to organized government would impinge upon First Amendment freedoms. Since the jury charge was disjunctive, *i. e.*, Miss Stromberg could be convicted if the jury found that she conducted the ceremony for any of the three statutorily prohibited goals, it was possible that her conviction rested totally upon an act entitled to constitutional protection. Presumably, given the jury's general verdict, it could have convicted Miss Stromberg for raising a red flag solely as a symbol of opposition to organized government but not as either an invitation to anarchistic action or an aid to propaganda of a seditious character.

The teaching of *Stromberg* is that, if there is any possibility the general verdict below rests on speech or conduct entitled to constitutional protection, then the conviction must be reversed. The *Stromberg* analysis cannot be applied to appellant's conviction as the factual patterns in the two cases are distinct. The record leaves no doubt that appellant did burn the flag. Nor can appellant argue that his act was not an act of desecration. The trial judge emphatically stated that the issue was whether

appellant burned the flag to destroy it in a dignified manner or to cast contempt upon it. Appellant's conviction therefore must be based upon a finding that he desecrated the flag by burning and neither he nor the Court suggests otherwise. We are not confronted with a jury trial and the consequent inability to determine the basis for the verdict below. The trial judge at the very outset of the trial made known his view that appellant's motivation for burning the flag was the probative issue. Combining this act of burning with a verbalization of the reasons for it does not allow the Court to avoid determining the constitutionality of appellant's conduct. Since there can be no claim that appellant was convicted for his speech, *Stromberg* simply does not apply.

My analysis is confirmed by an examination of the other cases upon which the Court relies. *Williams* v. *North Carolina*, 317 U. S. 287 (1942), presents a factual pattern identical to *Stromberg*. Williams, a resident of North Carolina, obtained a Nevada divorce and then remarried in Nevada. Upon his return to North Carolina, Williams was convicted of bigamous cohabitation. The jury was charged that it could convict Williams if it found either that he procured the divorce based upon substituted service or that he went to Nevada not to establish a bona fide residence but rather to obtain a divorce through a fraud upon the Nevada courts. Holding that the Full Faith and Credit Clause required North Carolina to respect Williams' Nevada divorce even though acquired by substituted service, the Court reversed Williams' conviction since it was possible that the jury found the divorce was not procured by fraud yet convicted Williams. Under this state of facts, the conviction could have been based upon the acquisition of a divorce North Carolina was constitutionally compelled to honor.

Terminello v. *Chicago*, 337 U. S. 1 (1949), reflects the same approach. Terminello was charged with disorderly conduct. The jury was allowed to convict if it found that Terminello's speech either stirred the public to anger or constituted "fighting words." Since only the latter may be constitutionally prohibited, the Court reversed. It was possible that the jury found that Terminello's speech merely stirred the public to anger yet convicted him. Terminello could have been convicted for constitutionally protected conduct; he was therefore entitled to a reversal. *Yates* v. *United States*, 354 U. S. 298 (1957), also conforms to this pattern. Charged with a violation of the Smith Act, Yates was convicted under instructions which made either "advocacy" or "organizing" a statutory violation. The Court decided that the jury instruction with regard to the organizing charge was erroneous; since the jury could have convicted Yates for organizing even if it found that he was not guilty of advocacy, the conviction was reversed.

The Court does not, however, base its reversal only upon a misapplication of *Stromberg*. Relying also on *Thomas* v. *Collins*, 323 U. S. 516 (1945), the Court holds that even if "the record precludes the inference that appellant's conviction might have been based *solely* on his words, we are still bound to reverse if the conviction could have been based upon *both* his words and his act." *Ante*, at 10. My reading of *Thomas* v. *Collins* indicates, however, that *Thomas* does not serve as justification for the Court's disposition of this case.[7] In *Thomas* a union organizer was held in contempt, fined and impris-

[7] I need not consider to what extent the *Thomas* Court's implicit assumption that Thomas could test the constitutionality of the restraining order without first attempting to secure judicial relief is inconsistent with *Walker* v. *City of Birmingham*, 388 U. S. 307 (1967); see *id.*, at 336 (dissenting opinion).

oned for disobeying a state court order enjoining him from violating a Texas statute. The statute required that labor organizers register with and procure an organizer's card from a designated Texas official before soliciting memberships in labor unions. Without either registering or procuring a card, the organizer made a speech before a group of workers. He extolled the virtues of union membership in general terms and also asked a specific individual to become a union member. As I read the case, *Thomas* holds that both the general solicitation and the solicitation of a named individual were within the protection of the First Amendment:

> "The occasion was clearly protected. The speech was an essential part of the occasion, unless all meaning and purpose were to be taken from it. And the invitations, both general and particular, were parts of the speech, inseparable incidents of the ocassion and all of that was said or done. . . . How one might 'laud unionism,' as the State and the State Supreme Court concede Thomas was free to do, yet in these circumstances not imply an invitation, is hard to conceive. This is the nub of the case, which the State fails to meet because it cannot do so." *Id.*, at 534–535.

Having so held, it was unnecessary for the Court to determine if an individual solicitation could have been enjoined. The union organizer therefore was entitled to relief without regard to whether his conviction was based upon the general or the individual solicitation.

I reiterate my belief that appellant was convicted for his act not his words. *Stromberg* and the cases based upon it do not allow us the luxury of refusing to treat appellant's claim that the burning of the flag as a protest is worthy of constitutional protection.

III.

I am in complete agreement with the general rule that this Court should not treat broad constitutional questions when narrow ones will suffice to dispose of the litigation. However, where only the broad question is presented, it is our task and our responsibility to confront that question squarely and resolve it. In a time when the American flag has increasingly become an integral part of public protests, the constitutionality of the flag desecration statutes enacted by all of the States [8] and Congress [9] is a matter of the most widespread concern. Both those who seek constitutional shelter for acts of flag desecration perpetrated in the course of a political protest and those who must enforce the law are entitled to know the scope of constitutional protection. The Court's explicit reservation of the constitutionality of flag burning prohibitions encourages others to test in the streets the power of our States and national government to impose criminal sanctions upon those who would desecrate the flag.

I believe that the States and the Federal Government do have the power to protect the flag from acts of desecration and disgrace. But because the Court has not met the issue, it would serve no purpose to delineate my reasons for this view. However, it is difficult for me to imagine that, had the Court faced this issue, it would have concluded otherwise. Since I am satisfied that the constitutionality of appellant's conduct should be resolved in this case and am convinced that this conduct can be criminally punished, I dissent.

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[8] Desecration of the Flag, Hearings on H. R. 271 before Subcommittee No. 4 of the House Committee on the Judiciary, 90th Cong., 1st Sess., Ser. 4, 324–346 (1967).

[9] 82 Stat. 291, 18 U. S. C. § 700.

"Mr. Goldstick [appellant's counsel]: Before we plead to this case I would like to make a motion to dismiss the information upon the ground it does not state facts to constitute a crime on the following grounds: The defendant was engaged in a constitutionally protected activity, to wit, freedom of speech. The allegation simply says that the defendant did wilfully and unlawfully set fire to an American flag and did say: 'If they did that to Meredith we don't need an American flag.' Under the first amendment of the Constitution of the United States and under the New York State constitution on freedom of speech they provide for protest in many forms, whether it be by burning a flag, demonstration or picketing. This is a form of demonstration and protest.

"Court: You say burning the flag is a form of demonstration?

"Mr. Goldstick: Yes.

"Court: Motion denied.

"Mr. Goldstick: Also, there is a Federal statute which provides for burning the flag. I refer Your Honor—

"Court, interposing: So does Section 1425 provide for the lawful disposition of a flag!

"Mr. Goldstick, continuing: I refer Your Honor to page 6 of my brief, referring to the United States Code that a flag, when it is in such a condition that it is no longer a fitting emblem for display, should be destroyed in a dignified way, preferably by burning.

"Now, under the supremacy clause, if there is any conflict with any statute the Federal statute takes

precedence; if a State law is in conflict with a Federal law the Federal law takes precedence. The Federal law provides you may burn an American Flag; therefore, New York State is without power to make a complaint and convict a man for the burning of an American flag.

"Court: Motions denied. The question here would be whether he burned it because it was in such poor condition that it should be burned, or if it was an illegal demonstration.

"Mr. Goldstick: Under the supremacy—

"Court, interposing: Next motion!

"No more argument, please!

"Mr. Goldstick: I plead the defendant not guilty and take exception to Your Honor's rulings.

"Court: Proceed! You may sit down, counselor! Now, we have two cases! One is Disorderly Conduct and one is Malicious Mischief.

"Mr. Goldstick: I see nothing in the information regarding a charge of Disorderly Conduct.

"Court: We have two charges before me!

"Show the complaints to counsel!

"Mr. Bonomo [the prosecutor]: We have two separate complaints! (Handing papers to Mr. Goldstick.)

"Mr. Goldstick: I plead not guilty to the Disorderly Conduct charge, too, Your Honor.

"Court: Are you ready for trial in each case?

"Mr. Goldstick: Yes.

"Court: Do you stipulate that the two cases will be tried together and the facts adduced in one will be applied to the other wherever necessary, and there will be separate findings on the facts and the law and separate judgments may be rendered?

"Mr. Goldstick: I so stipulate.

"Court: Let us proceed!

"Mr. Bonomo: I will call Patrolman James Copeland!"

[Officer Copeland testified on direct concerning the investigation of the source of a fire and his subsequent discovery that appellant had burned a flag.]

"Mr. Bonomo: That's all!

"Mr. Goldstick: Before I cross-examine I move to dismiss both charges upon the ground the People failed to make out a prima facie case.

"Court: Are you going to cross-examine?

"Mr. Goldstick: Yes, but I am making a motion before cross-examination!

"Court: You better cross-examine!"

[The cross-examination of Officer Copeland explored the size of the crowd that had gathered; no mention was made of appellant's words.]

"Mr. Goldstick: No further questions.

"Mr. Bonomo: People's case, in each case!

"Mr. Goldstick: I renew my motions to dismiss upon the ground the People failed to prove a prima facie case.

"Court: Motion denied as to each case.

"Mr. Goldstick: Exception. The defendant will take the stand!"

[Appellant then gave his version of the incident. Reproduced below is his testimony concerning the words spoken.]

"Q. Did the officer speak to you or did you speak to him? A. He spoke to me.

"Q. What did he say? A. He asked me if I set fire to the flag. I said yes.

"Q. Then what happened? A. I said: 'If they do what they had to Meredith we don't need this flag.'

"Q. While you were burning this flag did anybody say anything to you other than this police officer? A. Nobody.

"Q. Did anybody stop? A. I noticed no unusual crowd.

"Q. Where is that corner? A. St. James and Lafayette.

"Q. Were you on the curb or in the street? A. I was on the curb. The flag was laying on the curb.

"Q. When the police officer came up to you were you still by the flag? A. Yes.

"Q. The flag was still burning when the officer came? A. Yes.

"Q. Other than saying to the police officer 'if they did that to Meredith we don't need an American flag.' did you speak to anybody else at the time? A. No.

"Mr. Goldstick: No further questions!"

[Cross-examination of appellant contains no reference to any of his words.]

"Mr. Bonomo: That's all!

"Mr. Goldstick: The defendant rests.

"Mr. Bonomo: The People rest.

"Mr. Goldstick: I move to dismiss on all the constitutional grounds previously made, on all the grounds provided for in the Code of Criminal Procedure, and also upon the ground the People failed to prove a case beyond a reasonable doubt.

"Court: On the charge of Disorderly Conduct the defendant is acquitted; on the charge of Malicious Mischief the defendant is convicted.

Mr. Goldstick: May we have next Tuesday for sentence?

"Court: No, that is not enough time! August 9th for sentence; bail continued.

SUPREME COURT OF THE UNITED STATES

No. 5.—October Term, 1968.

Sidney Street, Appellant, *v.* State of New York.	On Appeal From the Court of Appeals of New York.

[April 21, 1969.]

Mr. Justice Black, dissenting.

I agree with the excellent opinion written by Chief Judge Fuld for a unanimous Court of Appeals, upholding the New York statute which this Court now holds unconstitutional as applied. The entire state court construed the statute as applied to this appellant as making it an offense publicly to burn an American flag in order to protest something that had occurred. In other words the offense which that court sustained was the burning of the flag and not the making of any statements about it. The Court seems to console itself for holding this New York flag-burning law unconstitutional as applied by saying that, as it reads the record, the conviction could have been based on the words spoken by the appellant as he was burning the flag. Those words indicated a desire on appellant's part to degrade and defame the flag. If I could agree with the Court's interpretation of the record as to the possibility of the conviction's resting on these spoken words, I would firmly and automatically agree that the law is unconstitutional. I would not feel constrained, as the Court seems to be, to search my imagination to see if I could think of interests the State may have in suppressing this freedom of speech. I would not balance away the First Amendment right that speech not be abridged in any fashion whatsoever. But I accept the unanimous opinion of the New York Court of Appeals that the conviction does

not and could not have rested merely on the spoken words but that it rested entirely on the fact that the defendants had publicly burned the American flag—against the law of the State of New York.

It passes my belief that anything in the Federal Constitution bars a State from making the deliberate burning of the American flag an offense. It is immaterial to me that words are spoken in connection with the burning. It is the *burning* of the flag that the State has set its face against. "It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to a speech or writing used as an integral part of conduct in violation of a valid criminal statute." *Giboney* v. *Empire Storage Co.*, 336 U. S. 490, 498 (1949). In my view this quotation from the *Giboney* case precisely applies here. The talking that was done took place "as an integral part of conduct in violation of a valid criminal statute" against burning the American flag in public. I would therefore affirm this conviction.

SUPREME COURT OF THE UNITED STATES

No. 5.—October Term, 1968.

Sidney Street, Appellant,
v.
State of New York.

On Appeal From the Court of Appeals of New York.

[April 21, 1969.]

Mr. Justice White, dissenting.

The Court has spun an intricate, technical web but I fear it has ensnared itself in its own remorseless logic and arrived at a result having no support in the facts of the case or the governing law.

The Court's schema is this: the statute forbids insults to the flag either by act or words; the charge alleged both flag burning and speech; the Court rendered a general judgment; since the conviction might logically have been for speech alone or for both words and deeds and since in either event the conviction is invalid, the judgment of the New York courts must be set aside without passing upon the validity of a conviction for burning the flag.[1] I reach precisely the opposite conclusion; before Street's conviction can either be reversed or affirmed, the Court *must* reach and decide the validity of a conviction for flag burning.

I reject first the Court's suggestion that we must assume from the trial court's judgment—which was that "on the charge of Malicious Mischief the defendant is convicted"—that Street might have been convicted for speech alone. True, the complaint referred to both burning and speaking and the statute permits conviction for either insulting words or physical desecration. But surely the Court has its tongue in its cheek when it infers

[1] The Court's theory is not that of unconstitutional overbreadth; it does not argue that New York may not convict for burning because the entire statute is unconstitutional for permitting convictions for insulting speech as well as for the act of flag burning.

from this record the possibility that Street was not convicted for burning the flag but only for the words he uttered. It is a distortion of the record to read it in this manner, as THE CHIEF JUSTICE convincingly demonstrates. But even if it were fair to infer that he was convicted for speaking as well as burning, it is sheer fancy to conclude that the trial court convicted him for speech alone and acquitted him of flag burning. The appellant does not seriously argue such a claim; his major point is that he *was* convicted for burning as a protest and that such a conviction cannot stand. The Court of Appeals of New York characterized the issue before it as whether the defendant could be validly convicted for burning the flag as a protest. Moreover, without clear indication from the state courts, I would not assume that the particular words which Street spoke in this case would be deemed within the coverage of the statute. In any event, if Street was convicted for speaking, he most certainly was also convicted for flag burning. Hence, *Stromberg* v. *California*, 283 U. S. 359 (1931), and like cases to which I adhere, have no application by their own terms.

I reject also the proposition that if Street was convicted for both burning and talking, his conviction must be reversed if the speech conviction is unconstitutional. The Court initially cites *Thomas* v. *Collins*, 323 U. S. 516 (1945), for the rule that where two acts violative of a statute are charged, a verdict of guilty on both acts and a single sentence must be reversed if conviction for either act is invalid. This has never been the prevailing rule in this country or in this Court, either before or after *Thomas* v. *Collins*. The Court in that case cited no authority for the proposition other than *Stromberg* and *Williams* v. *North Carolina*, 317 U. S. 287 (1942), neither of which announced that rule. I am not convinced that the rule stated by the *Thomas* Court was necessary for reversal, but whether dictum or not the rule on which

the Court relies today is at odds with many cases in this Court.

Claassen v. *United States*, 142 U. S. 140, 146–147 (1891), speaks for the law at that time:

> "And it is settled law in this court, and in this country generally, that in any criminal case a general verdict and judgment on an indictment or information containing several counts cannot be reversed on error, if any one of the counts is good and warrants the judgment, because, in the absence in the record to show the contrary, the presumption of law is that the court awarded sentence on the good count only. *Locke* v. *United States*, 7 Cranch, 339, 344; *Clifton* v. *United States*, 4 How. 242, 250; *Snyder* v. *United States*, 112 U. S. 216; *Bond* v. *Dustin*, 112 U. S. 604, 609; 1 Bishop Crim. Pro. § 1015; Wharton Crim. Pl. & Pract. § 771."

Many years later, in *Barenblatt* v. *United States*, 360 U. S. 109 (1959), the Court was equally clear. There the defendant was indicted in five counts for contempt in refusing to answer questions put by a congressional committee. The case was tried to a court without a jury and upon conviction under all counts a general sentence of six months' imprisonment and a fine of $200 was imposed. Because the conviction on at least some of the counts was warranted, the judgment was affirmed. Relying on *Claassen* among other cases, the Court said:

> "Since this sentence was less than the maximum punishment authorized by the statute for conviction under any one Count, the judgment below must be upheld if the conviction upon any of the Counts is sustainable." 360 U. S., at 115. (Footnote omitted.)

There are a host of other cases to the same effect.[2]

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[2] *E. g.*, *Pinkerton* v. *United States*, 328 U. S. 640, 641–642, n. 1 (1946); *Whitfield* v. *Ohio*, 297 U. S. 431, 438 (1936); *Sinclair* v.

Even accepting the notion that where there is a conviction on each of several counts and a general sentence is imposed, affirmance requires upholding the conviction on each and every count, the rule would have no application to the facts of this case. Such a rule would be based on the notion that the trial judge might have given a lesser sentence if he had known that some of the counts were infirm. Reversal of the judgment on less than all the counts would call only for resentencing, not for reversal of the convictions on the other counts.

Viewed in this light, the judgment of the New York courts, insofar as it convicted Street for flag burning, cannot be reversed simply because Street was also convicted for speaking and a general sentence was given. Neither can the case be remanded for resentencing since no sentence was imposed. Sentence was suspended under the then applicable New York law and the time for imposing a sentence had expired even before the judgment was reviewed in the New York Court of Appeals.

Recognizing the aberrance of *Thomas*, the Court now gives that case a new and more confusing gloss. The general finding of guilt for both speaking at a meeting

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United States, 279 U. S. 263, 299 (1929); *Abrams* v. *United States*, 250 U. S. 616, 619 (1919); *Ballew* v. *United States*, 160 U. S. 187, 197–203 (1895); *Goode* v. *United States*, 159 U. S. 663, 669 (1895); *Evans* v. *United States*, 153 U. S. 584, 595 (1894); *Evans* v. *United States*, 153 U. S. 608 (1894). This Court has recognized the applicability of the same rule to court martial proceedings, *Carter* v. *McClaughry*, 183 U. S. 365, 384–387 (1902), to forfeiture actions, *Snyder* v. *United States*, 112 U. S. 216, 217, (1884); *Clifton* v. *United States*, 4 How. 242, 250 (1846); *Locke* v. *United States*, 7 Cranch 339, 344 (1813); and to civil cases under state law, *Bond* v. *Dustin*, 112 U. S. 604, 609 (1884). In *United States* v. *Gainey*, 380 U. S. 63, 65 (1965), the Court applied the related concurrent sentence rule to a general sentence on a guilty verdict on an indictment charging several counts. See Transcript of Record 48–50, No. 13 October Term, 1964.

and for an individual solicitation was reversed, we are told, because the speech and solicitation were intertwined, making it uncertain that there was or would have been a judgment of guilty on the solicitation alone. Aside from the fact that *Thomas* itself said the penalty was imposed for *both violations*, the rationale which the Court extracts from the facts and judgment in that case hardly qualifies as a constitutional standard to be applied willy-nilly in all cases where there is a general verdict on a count charging dual violations. The Court is capable of more discriminating judgment than to insist on its newly fashioned doctrine in a case like Street's where it is so clear that there was at least a conviction for a public burning of the American flag.

The Court is obviously wrong in reversing the judgment below because it believes that Street was unconstitutionally convicted for speaking. Reversal can follow only if the Court reaches the conviction for flag burning and finds that conviction, as well as the assumed conviction for speech, to be violative of the First Amendment.[3] For myself, without the benefit of the majority's thinking if it were to find flag burning protected by the First Amendment, I would sustain such a conviction. I must dissent.

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[3] Arguably, under today's decision any conviction for flag burning where the defendant's words are critical to proving intent or some other element of the crime would be invalid since the conviction would be based in part on speech. The Court disclaims this result, but without explaining why it would not reverse a conviction for burning where words spoken at the time are necessarily used to prove a case and yet reverse burning convictions on precisely the same evidence simply because on that evidence the defendant might also have been convicted for speaking. The Court's seemingly narrow holding may be of potentially boader application, particularly in view of *Thomas* v. *Collins* as now rewritten by the Court.

SUPREME COURT OF THE UNITED STATES

No. 5.—October Term, 1968.

Sidney Street, Appellant, v. State of New York. | On Appeal From the Court of Appeals of New York.

[April 21, 1969.]

Mr. Justice Fortas, dissenting.

I agree with the dissenting opinion filed by The Chief Justice, but I believe that it is necessary briefly to set forth the reasons why the States and the Federal Government have the power to protect the flag from acts of desecration committed in public.

If the national flag were nothing more than a chattel, subject only to the rules governing the use of private personalty, its use would nevertheless be subject to certain types of state regulation. For example, regulations concerning the use of chattels which are reasonably designed to avoid danger to life or property, or impingement upon the rights of others to the quiet use of their property and of public facilities, would unquestionably be a valid exercise of police power. They would not necessarily be defeated by a claim that they conflicted with the rights of the owner of the regulated property. See, *e. g.*, *Village of Euclid* v. *Ambler Realty Co.*, 272 U. S. 365 (1926); *Berman* v. *Parker*, 348 U. S. 26 (1954).

If a state statute provided that it is a misdemeanor to burn one's shirt or trousers or shoes on the public thoroughfare, it could hardly be asserted that the citizen's constitutional right is violated. If the arsonist asserted that he was burning his shirt or trousers or shoes as a protest against the Government's fiscal policies, for example, it is hardly possible that his claim to First Amendment shelter would prevail against the State's claim of

a right to avert danger to the public and to avoid obstruction to traffic as a result of the fire. This is because action, even if clearly for serious protest purposes, is not entitled to the pervasive protection that is given to speech alone. See *Cantwell* v. *Connecticut*, 310 U. S. 296, 303–304 (1940). It may be subjected to reasonable regulation that appropriately takes into account the competing interests involved.

The test that is applicable in every case where conduct is restricted or prohibited is whether the regulation or prohibition is reasonable, due account being taken of the paramountcy of First Amendment values. If, as I submit, it is permissible to prohibit the burning of personal property on the public sidewalk, there is no basis for applying a different rule to flag burning. And the fact that the law is violated for purposes of protest does not immunize the violator. *United States* v. *O'Brien*, 391 U. S. 367 (1968); see *Giboney* v. *Empire Storage & Ice Co.*, 336 U. S. 490 (1949).

Beyond this, however, the flag is a special kind of personalty. Its use is traditionally and universally subject to special rules and regulation. As early as 1907, this Court affirmed the constitutionality of a state statute making it a crime to use a representation of the United States flag for purposes of advertising. *Halter* v. *Nebraska*, 205 U. S. 34 (1907). Statutes prescribe how the flag may be displayed; how it may lawfully be disposed of; when, how, and for what purposes it may and may not be used. See, *e. g.*, 4 U. S. C. § 3; 36 U. S. C. §§ 172–177. A person may "own" a flag, but ownership is subject to special burdens and responsibilities. A flag may be property, in a sense; but it is property burdened with peculiar obligations and restrictions. Certainly, as *Halter* v. *Nebraska*, *supra*, held, these special conditions are not *per se* arbitrary or beyond governmental power under our Constitution.

One may not justify the burning of a house, even if it is his own, on the ground, however sincere, that he does so as a protest. One may not justify breaking the windows of a government building on that basis. Protest does not exonerate lawlessness. And the prohibition against flag burning on the public thoroughfare being valid, the misdemeanor is not excused merely because it is an act of flamboyant protest.